THE

AUSTRALIAN LAW TIMES

Edited by JAMES C. ANDERSON, Esq.

BARRISTER-AT-LAW.

REPORTERS:

VICTORIA - -	JAMES C. ANDERSON, Esq. A. McHUGH, Esq. W. A. KILPATRICK, Esq.	BARRISTERS-AT-LAW.
SOUTH AUSTRALIA - -	JOYNER & PIPER,	SOLICITORS.
TASMANIA - - -	H. B. MUGLISTON, Esq.,	BARRISTER-AT-LAW.

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REPORTERS:

VICTORIA—JAMES C. ANDERSON, *Barrister-at-Law*.
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NOTES OF CASES
6th July, 1889

IN CHAMBERS.

Coram Williams, J.

LOOKER AND ANOTHER v. MURPHY.

11th June.

Rules of Supreme Court, 1884, *Order XXXI* r. 11—*Interrogatories—Further and better answers—A plaintiff is not entitled to ask a defendant to admit upon oath the construction sought to be placed on certain documents by the plaintiff—Where a defendant is interrogated as to his depositions in an examination in a Court of Insolvency he is not entitled to refuse to answer the same on the ground that by inspection of the depositions the plaintiff could have obtained the information he desires.*

Application on behalf of the plaintiffs under Order XXXI r. 11 for further and better answers to certain interrogatories. The action had been instituted to recover possession of certain lands mentioned in the statement of claim. By an indenture of settlement dated the 14th April 1855 and executed on the marriage of the defendant a sum of £2000 (*inter alia*) was put in settlement with the direction that the trustees appointed by the deed should as soon as convenient invest the same in real securities. The trusts declared in the settlement were to pay the income arising from the trust premises to the defendant for life or until insolvency; on the death or insolvency of defendant, to pay the income to the wife with the usual trusts in favor of the children of the marriage. Shortly after the execution of the settlement, the sum of £2000 was, according to the statement of claim invested in the purchase of the land which formed the subject of the present action; this statement however was denied by the defendant who alleged that the land in question had been purchased by him personally out of his own moneys. The next step in the case material to the present application was the execution of a deed dated 3rd September, 1863, appointing one John McKenzie as a new trustee of the marriage settlement. This deed was executed by the defendant amongst others (as being one of the persons entitled to nominate a new trustee); in this deed the lands which form the subject of the present application, though not actually described, were implied and recited as being portion of the trust premises; and accordingly, the plaintiff, on the pleadings, contended that the defendant was stopped from denying their title inasmuch as they represented John McKenzie. The last step in the proceedings, material to the present application, was the bankruptcy of the defendant on the 14th October, 1873; several examinations of the defendant were held in the matter of his insolvent estate and at these examinations he deposed to certain statements which were taken down in writing, and signed by him, and retained amongst the records of the insolvent court.

The interrogatories so far as material to the application were as follows:

1. Look at the copy Indenture of settlement dated 14th April, 1855 [being the document No. 16 in the 1st Schedule to your affidavit sworn herein on the 25th March, 1889] and state whether or not it is a copy of the Indenture referred to in the 1st paragraph of the Statement of Claim, if not how do you make out the contrary. Were you a party to the said Indenture and was not the same executed by all or which of the parties thereto. When and where did you last see the said Indenture and in whose possession was it. Have you any knowledge information or belief as to where and in whose possession it now is, and, if yea, set forth the particulars of such knowledge information and belief.

3. Look at the two Indentures dated the 2nd and 3rd September, 1863 referred to in the 10th paragraph of the Statement of Claim, the originals of which shall be produced to you if required, and state whether or not the Indenture of the 3rd September, 1863, was executed by you and by all the other parties thereto or which of them, and whether or not the pieces or parcels of land in the said Indentures mentioned or some and which of them are the same pieces or parcels of land as

are particularly described in the 3rd, 4th, and 7th paragraphs of the Statement of Claim, and whether or not the said lands became and were upon and after the execution of the said Indenture or of one and which of them vested in John McKenzie therein named for an estate in fee simple or for some other and what estate but upon the trusts declared by the said Indenture of the 14th April, 1855 or how otherwise.

5. Was not one Madame Carandini or some other and what person by name in possession of the said pieces or parcels of land or some and which of them as tenant or occupier or how otherwise from the 31st July 1877 to the 31st March 1878 or when. Did not the said Madame Carandini or other person pay some and what money or rent to the said Robert George Johnson in respect of such tenancy or occupation. Did not the said Robert George Johnson account to the plaintiffs for the rents and profits so received by him or some and what part thereof.

7. Were you examined on oath in the matter of your Insolvent Estate before the Court of Insolvency at Melbourne on the 3rd December 1873, the 29th May 1874, the 12th June 1874, and the 10th July 1874 or on some other and what days touching the said Insolvent's Estate.

8. Did you at some and which of the said examinations depose to, or to the following effect, namely—

(*a*) The house and grounds at South Yarra are my wife's separate property,

(*b*) The L2,000 was invested. I received the proceeds and accounted to my trustee. Since the sequestration Mr. McKenzie has received the proceeds and handed them over to Mrs. Murphy by my son.

(*c*) (*d*) and (*e*) were to a similar effect.

9. State whether or no the L2,000 in the 8th interrogatory mentioned is the same sum as the L2,000 mentioned in the said indenture of 14th April 1855, and whether or no the South Yarra property in the said 8th interrogatory mentioned is the property in whole or in part, and, if in part, to what extent, the subject matter of this action, and whether or no Mr. McKenzie in the said 8th interrogatory mentioned is the same John McKenzie in the Statement of Claim mentioned.

11. Were any and if so which of the statements mentioned in interrogatory 8 signed by you.

The answers to the above interrogatories were as follows :—

1. As to interrogatory numbered 1 I have no knowledge information or recollection and have formed no belief as to whether the copy indenture referred to is a copy of the indenture stated in the 1st paragraph of the Statement of Claim. I was a party to the said indenture but I have no knowledge information recollection or belief as to whether it was executed by all or any of the other parties stated in the 1st paragraph of the said Statement of Claim. I last saw the said indenture in the year 1874 on the occasion of my examination in the Insolvency Court, upon that occasion I handed it to Mr. Hedderwick a member of the firm of Crisp, Lewis and Hedderwick, solicitors, Melbourne, who was then acting as my solicitor; he retained it and I have never seen it since. I have no knowledge information or belief as to where and in whose possession it is at present.

3. As to interrogatory numbered 3. The indenture of the 3rd Sept. 1863 was executed by me. I have no knowledge, information or recollection and have formed no belief as to whether it was executed by all or any of the other parties thereto. The pieces or parcels of land particularly described in the 3rd. 4th. and 7th. paragraphs of the statement of claim are the same as the parcels of land set forth in the schedule to the indenture of the 2nd. September 1863. The said Indenture of the 3rd. September 1863 contains no recitals of the said parcels of land, but contains recitals of certain indentures whereby "the lands therein mentioned" are recited to be conveyed : on inspection of these last indentures I have formed the belief that the parcels of land therein described are the same as the parcels of land particularly described in the 3rd. 4th. and 7th. paragraphs of the statement of claim. I object to answer the remainder of interrogatory numbered 3 as I am advised it involves a question of law.

5. As to interrogatory numbered 5.—Madame Carandini was a tenant of the said parcels of land during the time specified. She paid rent sometimes to me and sometimes to the said Robert George Johnson as agent for me. The said Robert George Johnson accounted to me, and to no other person for any moneys received by way of rent by him. On the termination of her tenancy Madame Carandini delivered up possession to me personally.

7. As to interrogatory numbered 7.—I was examined on oath in the matter of my insolvent estate but I am unable to the best of my knowledge, information, recollection, or belief to state if the days specified were the days on which the said examinations took place, or on what days the said examinations took place.

8. As to interrogatory numbered 8.—I am unable to the best of my knowledge, information, recollection, or belief to state if all or any of the statements or statements to a like effect were made by me at any of the said examinations, owing to the lapse of time, I am unable to the best of my knowledge, information, recollection or belief, to say what statements were made by me at the said examination.

9. As to interrogatory number 9.—I repeat answer numbered 8.

11. As to interrogatory numbered 11.—I repeat answer number 8.

Mr Stawell, in support.—Except by inference the defendant does not say in his answer to interrogatory 1 whether he executed the document or not. The plaintiffs are entitled to the information asked for in 3. They desire an admission that McKenzie was entitled to the land in fee, as this would save them the expense of tracing the title down to him. *Attorney General v. Gaskill* 20 Ch. D. 319. The answer to 5 does not state what rent was paid. This is important on the subject of mesne profits. Interrogatories 7, 8, 9, and 11 ought to be answered. The defendant, by a visit to the law courts, could obtain the information desired.

Mr. McHugh to oppose.—Interrogatory 1 is answered sufficiently. The whole action turns upon the construction to be placed upon two documents so that if the defendant admitted what the plaintiffs desire in interrogatory 3 he would admit the whole of the plaintiffs case. As to interrogatory 5 the amount of the rent is not material. As to interrogatories 7, 8, 9, and 11, the information that can be demanded from a defendant is information in his own knowledge or in that of his agent or that can be obtained from documents in his possession, but not information to be obtained from public documents which the plaintiff can inspect. *Bray on Discovery* p.p. 135 142; *Lyell v. Kennedy* 9 Ap. Cas. 81; *Glengall v. Frazer* 2. Hare 99.

His Honor said.—I am quite clear that the answer to interrogatory 1 ought to be more explicit. If the defendant were to say that he was a party to and executed the document that would be sufficient. As to interrogatory 3 I think the ground of objection is a good one. This interrogatory asks the defendant to admit upon oath the plaintiff's construction of these two deeds, and I think the defendant was well advised in objecting to answer it. As to interrogatory 5 the defendant has clearly omitted to answer a portion namely the amount of rent, which should be answered. As to interrogatories 7, 8, 9, and 11 I must say I had some doubt which I do not say is altogether removed

I think a defendant ought to resort to all means which are accessible to him, and which are certainly more his property than that of the plaintiff, which will save expense and simplify proof. In these interrogatories the defendant is asked [His Honor here read the interrogatories] and he has answered as follows [His Honor here read the answers thereto]. By simply going to the Insolvency Court and looking at his own examination upon oath he would enable himself to answer these interrogatories fully and he ought I think under the circumstances to take this trouble. Except as to interrogatory 3 I allow the summons. Costs to be costs in the cause; certify for counsel. The defendant to answer further within four days.

Solicitors.—for plaintiffs, *Crisp, Lewis, and Hedderwick*; for defendant, *Lynch, McDonald, Stillman, and Keep.*

IN CHAMBERS.

(Before Williams, J.)

MUNRO & CO. v. O'HANLON

21st June.

Rules of Supreme Court, 1884, *Order XVI r.* 11—*Adding defendants—Order XVI r.* 11 *applies to cases where a defendant, under the old system of pleading, could have pleade in abatement the non-joinder of those persons who the plaintiff seeks to add as defendants.*

Application on behalf of the plaintiffs under Order XVI r. 11 to add Girdon & Moffat as defendants.

The action was for the recovery of calls on shares due to the plaintiff company. O'Hanlon was on the register of shareholders and the action was in the first instance brought against him. O'Hanlon pleaded infancy and that he was not a member of the company. It appeared from the affidavit filed in support of the application that Moffat placed the shares in the hands of a broker for sale and that Moffat at the instigation of the broker transferred the shares to O'Hanlon who was a clerk in the broker's employ and it was alleged that this transfer was an illusive one and that O'Hanlon was a mere dummy.

Mr. Hood in support—If the allegations contained in the affidavit are true, then Moffat certainly should be joined. The plaintiffs wish to have these persons before the Court to ascertain the meaning of this juggle.

Mr. Irvine, for the defendant, to oppose.—There is no jurisdiction to make this order. The presence before the court of the transferrors is not necessary for the determination of the action. If the action were to rectify the register then they might be necessary; but in this case the only question is whether the defendant is liable to pay the call or not. Order XVI r. 11 is only applicable to cases of misjoinder or non-joinder of parties. If a plea in abatement would have succeeded under the old practice a party may now be added. This is the test as laid down in *Hendall, v. Hamilton* 4 ap. cas. 504, *Pilley v. Robinson* 20 Q.B.D. 155 adopts this view. *Walcott v. Lyons* 29 Ch. D. 584.

Mr. Weigall, for Moffat, to oppose.—The Companies Statute make the person on the register *prima facie* liable. O'Hanlon is on the register and therefore is liable. Moffat has sold the share and his presence could not be necessary in any action other than for the rectification of the register.

HIS HONOR said I will consider the matter.

HIS HONOR, on a subsequent day, said:—This is an action by Munro & Co v. O'Hanlon for calls due by him as a shareholder in the company. An application was made by the plaintiff company to add two persons Girdon and Moffat as defendants under Order XVI r. 11. The ground of the application being shortly that O'Hanlon was a dummy, that is a sort of fraudulent dummy and not really the person who should be held liable and that the two persons Girdon and Moffat were really the responsible parties. Mr. Irvine who appeared for defendant O'Hanlon raised an objection to jurisdiction shortly very clearly and cogently put, which I think ought to prevail. He contended that the power given by the rule was never intended to apply to a case of the present description, and cited in support of his argument certain very weighty observations made by Lord Cairns in *Hendall v. Hamilton* 4. ap cas. 504 and by Stephen J. in *Pilley v. Robinson* 20. Q.B.D. 155. With what object Mr. Irvine's client raised the objection or what benefit his client expects to derive from its allowance are matters with which I need not concern myself I think for the purpose of ascertaining the limits within which the power given by the rule shall be applied, and in cases of this description the test suggested is not an unreasonable one, viz., could the defendant under the old system have pleaded in abatement the non-joinder of those whom it it sought to add as co-defendants. It is clear that in this case the defendant could not successfully have pleaded the non-joinder of either Girdon or Moffat. I have been since referred to a recent case of *Byrne v. Broker*, 5. T.LR. 255 which apparently extends the principle; but even if does that case is clearly distinguishable from the present. Summons dismissed with costs, £2 2s. each to defendant and Moffat. Certify for counsel.

Solicitors for plaintiff, *Malleson, England, & Stewart*; for defendant o r Moffat, *Smith, Emmerton & Johnson.*

(Before Williams J.)

McCARRON, BIRD & Co. v. SYME and ANOR.

21st and 24th June.

Rules of Supreme Corrt, 1884, or e r *XIX* r. 7—*Lib —Further particulars— Oder.*

Applications under order XIX r. 7 on behalf of the plaintiffs for further and better particulars.

The statement of claim, so far as material to the present application, was as follows:

2. On March 16th 1887, the defendants falsely and maliciously printed and published in their said newspaper "The Age," of and concerning the plaintiffs and of and concerning the plaintiffs in their said business as printers and publishers and in relation to the said book the words following:—"Quite a commotion has been caused in this district over a work entitled the History of Victoria and its Metropolis (meaning the said book printed and published by the plaintiffs as aforesaid) which is now being delivered *according to order* by a Melbourne publishing firm (meaning the plaintiffs.) Many people allege that they have been victimised and there is a unanimity of averment amongst those to whom the books are being delivered that they never signed an order for the book, but only a document containing the information relating to the early history of the district which was solicited by the canvasser. Numbers declare that they absolutely refused to sign the order but were asked "Just to sign the information supplied as a guarantee of its correctness." It would appear as if a clever dodge had been worked in securing the signatures to the orders, as numbers of people at Lara and Werribee complain that they were "got at" in a similar manner. Some of the farmers favor the idea of forming a defence fund and contesting payment in the Police Court" whereby the plaintiffs have suffered damage.

The defence was as follows:

The defendants say that

1. They deny that they printed or published the said words of the plaintiffs or of them in their said business.
2. They deny that the said words bear the meaning alleged or any libellous meaning.
3. The said words without the alleged meaning are true in substance and in fact.

PARTICULARS.

Certain persons representing themselves as engaged in the work of collecting material for a book to be published containing the histories of old colonial residents, called at various times in the year 1887, upon certain residents at Werribee, Lara and Little River, and requested information from such residents. Such information was given verbally and notes in writing were then taken by such persons who thereafter asked each informant to just sign such notes as a guarantee that the information was correct. Some of the said residents were asked to give orders for the said book so to be published, but refused. It subsequently appears that such persons were canvassers employed by the plaintiffs and such canvassers falsely allege that the said residents signed orders for the said book and the plaintiffs have sent out copies of such book to the said residents who refused to receive the same. Some of the said residents are farmers and have considered the advisability of forming a fund for the purpose of enabling them to defray the expense of defending any actions the plaintiffs might bring in the Police Court for the price of the said book.

The plaintiffs by the summons asked for the following further and better particulars to the defence of justification.

1. The names and addresses of the "certain persons" representing themselves as engaged in the work of collecting material for the book in the pleadings in this action mentioned.
2. The mode of representation, whether verbally or in writing.
3. The times they called during the year 1887.
4. The names and addresses of the certain residents at Werribee, Lara and Little River upon whom they called.
5. What information they requested,
6. The names and addresses of the persons referred to in the Defence as "some of the said residents" who were asked to give orders for the said book and refused.
7. The date when it "appeared" that the said certain persons were canvassers employed by the plaintiff as alleged.
8. What the defendants in their defence mean by "appeared;" do they mean to allege that the said certain persons were in fact or only appeared to the defendants to be employed by the plaintiffs.
9. The names and addresses of such of the persons referred to in the defence as "some of the said residents are farmers.
10. As to "considered the advisability" what is meant? Does it mean a mere mental consideration or that any actual or if so what overt steps were taken by them to form a "fund' as alleged.

Mr, Anderson in support. The representations were evidently made by the plaintiffs' agent and not by the plaintiffs themselves, it is therefore to be presumed that the plaintiffs did not authorise the agents to make these representations, and knew nothing about them. The plaintiffs under the circumstances are entitled to the particulars of the persons to whom the representations were made, the plaintiffs cannot tell where or under what circumstances the agents uttered the words, and may therefore come to trial in entire ignorance of the persons to whom they were uttered and unprepared to meet the defence made against them. *Bradbury v. Cooper* 12. Q.B.D. 94. Even if the plaintiffs were alleged to have made the representations themselves they would be entitled to particulars of the names and addresses of the persons to whom these representations were alleged to have been made. *Roselle v. Buchanan*, 16., Q.B.D. 656.

Hood to oppose, The plaintiffs are not charged with making the representations themselves; they are alleged to have been made by their canvassers. The defendants know nothing about these canvassers, and the plaintiffs must know who they are and where they live. The defendants are quite willing to giving the information required as to the mode of representation. As to the information asked for in 3. 4, 5, 6, and 9 the plaintiffs must have the orders obtained by their canvassers, and from those orders they can obtain the dates on which the canvassers called. They seek to ask for the names and addresses of our witnesses which cannot be done before trial. The defendants do not know how it "appeared." The meaning of "considering the advisability" is self-evident. The cases of *Bradbury v. Cooper* and *Roselle v. Buchanan* do not apply for this is an action of libel, and those were both actions of slander in which it is distinctly shown that a different practice has come into existence

HIS HONOR said—I will consider the mattter.

HIS HONOR on a subsequent day said. This was an application by the plaintiffs for further and better particulars under a general plea of justification. The plaintiffs complain of a libel published by the defendants in the "*Age*" newspaper which was as follows:—[His Honor read the libel complained of.] The defendants pleaded the general plea of justification stating that "the said words without the alleged meaning are true in substance and in fact," and then delivered particulars under that plea. What struck me at the outset was this; the rule has always been presumed to be that a party should not be compelled to disclose his evidence. At the same time I see that unless I

indirectly infringe that rule the plaintiffs will be quite at sea as to what evidence they have to meet at the trial. I therefore think that some further and better particulars ought to be given; at the same time I shall endeavour not to infringe the rule I have just mentioned more than is absolutely necessary. Dealing in order with the particulars asked for in the plaintiffs summons I think:—

1. It is essential for the plaintiffs to get some information as to who the agents were who are said to have made these alleged misrepresentations the plaintiffs presumably repudiate that any authority was given by them to the agents to make these misrepresentations and I think it is only right that they should be afforded the means of culling out those of them whom it is alleged by the defendants have been guilty of these practises in the Geelong district. Unless this be given the plaintiffs will be unable to contradict the witnesses. If the defendants can give these particulars they ought to give them to the best of their ability. I would go further and say that if they cannot do so, they could, by disclosing the names of one or two of the persons on whom these agents called, enable the plaintiffs to obtain the information sought for and therefore I think that unless they can give the names and addresses of these agents, they ought to give the names and addresses of the persons on whom they are said to have called.

2. Is not opposed.

3. This ought to be supplied with as great certainty as possible for the purpose of identification.

4. Ought to be refused except as it may be necessary to identify the agents. If they cannot give the information under 1 & 3 then the information asked for should be given.

5. Refused.

6. Refused on same grounds as 4.

7 & 8, I will take together I think information should be given as to when it appeared and the manner in which it appeared.

9. Should be refused.

10. Is decidedly hypercritical and I will refuse it. Costs to be costs in the cause. I certify for counsel.

Solicitors for plaintiffs, *Braham & Pirani*; for defendants, *Gillott Croker & Snowden.*

SITTINGS IN BANCO.

(Before Higinbotham, C J., Williams and Holroyd, J.J.)

SLADE v. VICTORIAN RAILWAYS COMMISSIONERS.

Sept. 22, 23, 1888, May 28, 1889.

Negligence—Dangerous Machine—Injury to Child—Bare licensee—Trespasser—Points Reserved—Finding of Jury—Judicature Act 1883 *(No.* 761) *Sec.* 25.

Per Williams and Holroyd, J.J.—Persons in whom property is vested are not liable for an injury caused to a trespasser or a bare licensee even though he is a child of tender years by a machine used by them on their premises (which is not dangerous in itself and which cannot become dangerous accidentally) being meddled with by mischievous persons unauthorised by them but they would be liable for an injury to a bare licensee caused by a trap or hidden danger of the existence of which they knew or ought to be presumed to know.

Per Higinbotham, C.J.—The extended power given by the Judicature Act Sec 25 to a judge to reserve any case or any point in a case for the consideration of the Full Court does not include a power to the Full Court upon the consideration of points reserved to disregard or overrule the findings of the jury which can only be dealt with upon a motion for new trial or an appeal.

Points reserved by Williams, J.

This was an action tried before Williams, J., and a jury in August last in which a boy 10 years of age by his next friend brought an action against the Victorian Railways Commissioners to recover damages for a hurt sustained by his foot being caught and crushed in a "traveller" in motion on the Port Melbourne Railway pier as it was alleged through the negligence of the defendants. This "traveller" or "traverser" was used to connect the traffic and by means of it trucks were shifted from one line of rails to another and it appeared that when not in use it was fastened by means of a clamp some thirty pounds in weight which slipped into a slot. Boys were in the habit of lifting this clamp for the purpose of pushing the traveller along while others of them were having a ride. The plaintiff was on the pier on the afternoon of Hospital Sunday in October, 1887, when there was a band of music playing and stated that he was sitting on the traveller listening to the music when some boys pushed the traveller along and crushed his foot. There was some evidence that the plaintiff was having a ride on the traveller with other boys previously and that he and the other boys had been warned by the caretaker but the jury said he had not been so warned. The clamp for fastening the traveller had been put down on the Saturday evening previous and must have been lifted by some of the boys during the Sunday. The jury answered several questions in favour of the plaintiff which findings are set out in the judgment of Higinbotham, C.J., and gave a general verdict for plaintiff for £1,000. The learned judge reserved three questions for the consideration of the Full Court (1). That there was no evidence of negligence on the part of the defendants (2). That the traveller was not dangerous unless meddled with. (3). That paragraph 3 of the defence which alleged that the traveller was properly and securely guarded and fastened and paragraph 5 of the defence which alleged that the traveller was not a machine dangerous in itself and the same was properly and securely fastened and was by the plaintiff

and other boys improperly interfered with and set in motion were proved.

Dr. Madden and Hood (for the plaintiff)—The jury negatived every plea the defendants set up. The authorities shew they are liable. *Lynch v. Nurdin* 1 Q.B. 29; *Mangan v. Atherton* 1 L.R. Ex 239; *Clark v. Chambers* 3 Q.B.D. 327; *Lay v. Midland Railway Company* 34 L.T, 30; *Bridges v. North London Railway Company* L.R. 7 E. x J Ap 233; *Grill v. General Iron Screw Company* L.R. I, C.P. 612; *Metropolitan Railway Company v. Wright* 11 Ap. Ca. 156. The distinction between contributory negligence of children and grown up people is shewn in *McKinnon v. Morris* 11 V.L.R. 196. [Williams, J.: The plaintiff's cross-examination contradicted his evidence in chief.] This Court has already decided this month in *Nicoll v. Nicoll* that where a plaintiff gave and repeated an answer in cross examination which disposed of his whole case as he had given a different answer in examination in chief the learned judge of the County Court was wrong in non-suiting him and should have sent the case to the jury. [Williams, J.: There the witness corrected himself during the cross-examination.] Only after it was suggested what would be the consequence. [*Box*: You do not say whether we are liable for a dangerous machine or negligence.] We merely set out our facts. [Williams, J.: They do not attack the findings of the jury or move for a new trial.]

Helm and Box (for the defendants).—At the close of the plaintiff's case the objection was taken that there was no evidence of negligence or of the machine being dangerous. We do not deny that there was evidence that the plaintiff was lawfully on the pier as a bare licensee. The question is: What is the duty of persons who own a particular property towards bare licensees permitted to go on that property by tacit permission and not induced to go on by allurement invitation or contract? Such a person who goes on merely because the owner does not object must take the place as he finds it. All the cases cited relate to a public place where the plaintiff had a right to go and the defendant no right to object or to a machine dangerous in itself. This pier is vested in the defendants by Act No. 767 Sec. 40. [Higinbotham C.J.: Does that give them a right to exclude the public?] It gives a right to regulate the use. [Higinbotham, C.J.: Until you withdraw your permission he has a right to be there. How is your liability altered? What is the exact distinction between the custodian of a public place and the owner of a private place which the plaintiff has a license to enter?] The duty is altered. This is like the cases of owners of mews in England. [Holroyd, J.: The Railways Commissioners have power to frame bye-laws. Were these bye-laws in evidence?] No. See *Bolch v. Smith* 7 H. & N. 736; *Southcote v. Stanley* 1 H. & N. 247; *Deane v. Clayton* T. Taunt 522; *Clark v. Chambers* 3 Q.B.D. 327; *Dixon v. Bell* 5 M. and S. 198. [Williams, J.: In the case of private parks at home do not the public visit them at their peril?] Yes. [Higinbotham, C.J.: There is evidence this traveller was not in its proper place. Do you say this pier is so entirely a private place that the Railways Commissioners incurred no liability for anything safe or unsafe on it?] Yes, unless the person injured came by contract or on business. *Tooney v. London and Brighton Railway Co.*, 3 C.B.N. S. 146; *Ryder v. Wombwell* 4 L.R. Ex. 32 show that a good deal more than a scintilla of evidence is necessary before the case should be sent to the jury. The reservations at the close of the case stand good and quite outside the findings of the jury which cannot be supported. This court is now in the same position as the judge at the end of the case. *Giblen v. M'Mullen* 2 D. R. P. C. 317. On the notes facts and pleadings the plaintiff has no case. The pleadings seem to shew the case to be one of a dangerous machine but counsel for the plaintiff seem now to be relying on negligence. This machine had been on the pier for many years without any accident and was not dangerous unless meddled with by lifting heavy clamps 30 or 40 pounds weight. The injury was caused not by the machine but by the boy and his co-actors and then the court should interfere before it goes to the jury not on the ground of contributory negligence. *Sayer v. Hatton* 1 C & E 494. We never tacitly permitted this boy to ride on this traveller. He went for his own gratification. A boy merely because he is a boy, cannot claim for injury which he has caused himself as by jumping on the tail-board of an omnibus. A man has no right to leave a cart unprotected on a highway for boys to clamber on but defendants had a right to have this traveller here. A possible precaution after damage is not evidence of negligence. *Gantiel v. Egerton* L R 2 C. P. 371 Willis J at p. 374. *Hughes v. Macfie* 2 H & C. 749, *Mangan v. Atherton* L. R. 1 Ex. 239. *Crafter v. Metropolitan Railway Coy* L.R. 1 C. P. 300; *Clarke v. Chambers* L. R. 3 Q. B. D. at page 338; *Smith v. London & St. Katherine's Dock Coy.* L.R. 3 C.P. 332; *McKinnon v. Morris* 11 V. L. R. 176; *Jewson v. Gatty* 1 C. & E. 364.

Hood (in reply). The question is this, on the whole case is there a case to go the jury? The question of trespass or license is not applicable. Defendants are responsible even to trespassers if the machine is dangerous in itself or may become dangerous. *Heaven v. Pender* 11 Q. B. D. 506. [Holroyd J, that is more like a guest but in the case of a horse and cart being left on the street they are trespassers and a nusiance]. *Coby v. Hill* C. B. N.S. 556 an invitation imports a knowledge by defendant of the probable use of the article and therefore establishes the duty. *Gantiel v. Egerton* is distinguishable as there the children were acquainted with the danger. In *Deaner v. Clayton* the plaintiff kept the verdict though he was a mere trespasser and had knowledge of the danger. In *Bolch v. Smith* the plaintiff had knowledge and so it was a question of *Violenti non fit injuria* or contributory negligence. [Holroyd J., the boy here knew this machine could be moved, and knowing that put his legs in a

dangerous position.] That question is for the jury, If a reasonable man might know that it could be put in motion, so as to be dangerous it is a dangerous machine. This is not private property of the defendants. It it is only vested in them for the purposes of the Act No. 767 see Sec. 40., 44. The preamble shows they are State Railways and the public is only governed by the regulations. [Holroyd J., they are kept out subject to limitation]. They are subject to by-laws as on a highway. Here a danger is strung on plaintiff and if it is not hidden the case becomes one of merely contributory negligence. [Holroyd J., Is he lawfully there at all?] *Lord Hamer v. Flight* 24 W. R. 346 per. Brett J. *Heaven v. Pender* 11 Q. B. D. p. 515 per Cotton L. J. *Sheridan v. Board of Land and Works* 9 V. L. R. (L) 421.

HIGINBOTHAM, C.J. :—This is an action by a boy 10 years old, by his next friend, against the Victorian Railways Commissioners to recover damages for a hurt sustained by his foot being caught and crushed by a "traveller" in motion on the Port Melbourne railway pier through the alleged negligence of the defendants. At the trial before Williams J., the plaintiff had a verdict for L1,000, the amount claimed. In reply to specific questions put by the learned judge, the jury found that the plaintiff was lawfully on the pier on the day in question—a Sunday in October, 1887—that the "travellers" are dangerous to persons on the pier when in motion; that the "traveller" which did the hurt was not, in the opinion of the jury, securely guarded or fastened, so as to prevent its being moved that the defendants had not, in the opinion of the jury, taken reasonable precautions to prevent the traveller being set into motion by persons meddling or playing with the traveller and not authorised to set it in motion; that the defendants had, in the opinion of the ury, taken reasonable precautions to prevent the traveller getting into motion by other means than that of personal interference; that the plaintiff had not brought about the accident by his own fault; that the plaintiff could not, in the opinion of the jury, by the exercise of ordinary care and caution, have avoided the accident; that the plaintiff was not playing with the other boys with the traveller for the purpose of having a ride upon it; and that he merely took a seat on the traveller before it was set in motion for the purpose of listening to the music, and that it was set in motion after he had so taken his seat, without his knowledge or consent. These findings of facts now bind this Court, in my opinion. Reservations at a trial were always in the nature of a convention between the judge, the jury, and counsel, and the answers of the jury to specific questions put to them at the trial controlled the Court in considering how the verdict should ultimately be entered (per Mellor, J., in *Hollnis v. Fowler* L.R., 7 E. and Ir. App., at p. 772, *Urquhart v. Macpherson*, L.R., 3 App. Cas., at p. 326). By the Judicature Act, section 25, a judge may reserve any case or any point in any case, for the consideration of the Full Court. The extended power given by this section and by the rules of court to a judge at the trial was not intended, I think, to include a power to the Full court upon consideration of points reserved of disregarding or overruling the special findings of the jury. A seeming conflict, if there be any, between the special findings of the jury and the evidence can be dealt with only upon a motion for a new trial or an appeal. The following three points in the case were reserved by the learned judge at the close of the case for the consideration of the Full Court. First, that there was no evidence of negligence on the part of the defendants. Second, that the traveller was not dangerous unless meddled with. Third, that paragraph 3 of the defence which alleged that the traveller was properly and securely guarded and fastened, and paragraph 5 of the defence, which alleged that the traveller was not a machine dangerous in itself, and the same was properly and securely fastened, and was by the plaintiff and other boys improperly interfered with and set in motion, were proved. The first of these points reserved has been argued before us on a ground which does not appear to have been raised or even mentioned by either party at the trial. It is now contended that the plaintiff was a bare licensee, that his presence on the pier on the day in question was not by the invitation express or implied of the defendants, and that, consequently, he was there at his own risk, and that the defendants are not liable. *Bolch v. Smith*, 7 H. and N., p. 736, was cited in support of this view to show that permission to go on a man's land, while it involves leave and license, gives no right. The distinction between such a bare licensee and a person who is to be presumed to be present by invitation is thus referred to by Erle, J., in *Chapman v. Rothwell*, E.B. and E., p. 168. "The distinction is between the case of a visitor (as the plaintiff was in *Southcote v. Stanley*, 1 H. and N,, p. 247) who must take care of himself, and a customer who as one of the public is invited for the purposes of business carried on by the defendant." Referring to this distinction Willes, J., in delivering the judgment of the Court in *Indermaur v. Dames*, L.R., 1 C.P., at p. 287, observed that "this protection does not depend upon the fact of a contract being entered into in the way of the shopkeeper's business during the stay of the customer, but upon the fact that the customer has come into the shop in pursuance of a tacit invitation given by the shopkeeper with a view to business which concerns himself." And on page 288 he observes that "the class to which the customer belongs includes persons who go, not as mere volunteers, or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier, and upon his invitation, express or implied. And with respect to such a visitor, at least, we consider it settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know; and that where there is evidence of neglect, the question whether such reasonable care has been taken by no-

tice of lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must he determined by a jury as a matter of fact." This judgment was confirmed on appeal. The commencing words of the paragraph above quoted are cited with approval by Blackburn, J., in *Smith v. Steele*, L.R., 10 Q.B., at p. 127. The plaintiff, with the public generally, was admittedly licensed by the defendants to be on the pier on the day in question. The license—if it were no more than a license—would include, I should say, permission to all the licensees to seat themselves on any part of the pier, or on a traveller, or on any other thing or object on the pier that could be reasonably used for that purpose without doing injury to it or causing danger to others lawfully using the pier. But a bare licensee would do that and every other act in the exercise of the license entirely at his own risk. The *onus* lay on the plaintiff of proving that he was not a mere licensee. The evidence showing that the plaintiff was something more than a licensee, and that the defendants invited the public to the pier on the day in question with a view to business which concerned themselves, was certainly scanty, possibly because the facts were supposed to be generally known and easily proved, and therefore not likely to be disputed. But there was sufficient, I think to justify the finding favorable to the plaintiff included in the general verdict. The Sandridge pier is vested in the defendants and is under their control (Act No. 767, Sec. 40) ; it is connected with their railway, and goods and passengers are carried to and from it by the defendants railway from Melbourne to Port Melbourne. A passenger steamboat plies to and from the pier on Sundays. A pierman employed by the defendants occupied a house on the pier, and it was his duty on Sundays to attend to the steamboat on its arrival and departure from the pier, and to go up and down the pier to see that all was right. It was a reasonable inference from these facts that the defendants carried on, or were interested in, a passenger business by rail and steamboat to and from the pier on Sundays, and that it concerned their business that the pnblic should be encouraged to do what it is stated the public in fact did, resort freely to the pier on Sundays. The plaintiff was on the pier as one of the invited public, and it made no difference that he was not a passenger either by rail or steamboat. See per Willis, J., *ubi supra*, and *Langton v. the Board of Land and Works*, 6 V. L. R. (L), p. 316 *Sweeney v. The Board of Land and Works*. 4 V. L. R. p. 440. He was entitled therefore to expect that the defendants would use reasonable care to prevent damage from any unusual danger on the pier which they knew or ought to have known. Then did the defendants use such reasonable care ? I think that there was sufficient evidence to justify the jury in finding that they did not. The traveller though not dangerous in itself and when at rest, would undoubtedly be a source of danger to foot-passengers if it should be unguarded, and not held in its place by clamps or otherwise. This was known to the defendants' servants, whose duty it appeared to be to place the clamps on the travellers down at the conclusion of each week-day's work. But no means were employed to fasten the clamps, or to guard them so as to prevent them from being raised by careless or mischievous Sunday visitors. The neglect to employ any such means was the ground, and it was in my opinion a sufficient ground, on which the jury found that the defendants were guilty of negligence. The fact that the clamps were not raised by any of the defendant's servants, but probably by boys at play, would not exonerate the defendants. The primary and substantial cause of the accident was the neglect of the defendants to securely fasten or to guard the clamps. "A man who leaves in a public place, along which persons, and amongst them children, have to pass, a dangerous machine, which may be fatal to any one who touches it, without any precaution against mischief, is not only guilty of negligence, but of negligence of a very reprehensible character, and not the less so because the imprudent and unauthorised act of another may be necessary to realise the mischief to which the unlawful act or neglect of the defendant has given occasion." Per Brett, J., in *Collins v. Middle Level Commissioners*, L.R. 4 C.P., p. 279 ; see also *Mackinnon v. Morris*, 11 V.L.R., p. 176, and *Clark v. Chambers*, 3 Q.B.D., p. 327. The second point reserved is included in and governed by the first. Although the traveller was not dangerous unless meddled with, the defendants are liable to invited visitors for their own negligence as the primary cause of the mischief realised by the intermeddling boys who raised the clamps and set the traveller in motion. With respect to the third point reserved, I think the third paragraph of the defence was not proved. The jury have found that the traveller was not securely guarded or fastened so as to prevent its being moved. The evidence was decisive in favor of this finding. The allegation in the third paragraph would be immaterial, and would not amount to a defence, if understood in the sense that the traveller was securely fastened and guarded, except as against persons improperly intermeddling with it. If the plaintiff was on the pier by the invitation of the defendants, they would be liable unless they took reasonable precautions, which the jury find they did not take, against the improper intermeddling by other persons with the traveller, by which it was set in motion. I am also of opinion that the fifth paragraph of the defence was not proved. The material allegation in this paragraph is that the plaintiff and other boys improperly interfered with and set the traveller in motion. The jury have found that the plaintiff did not know of or consent to the acts of those persons, whoever they were, that set the traveller in motion, and that he could not by the exercise of ordinary care and caution have avoided the accident that resulted from its being set in motion. The evidence on this point is not satisfactory, but there was sufficient in my opinion to make the question one for the jury, and to remove it beyond the jurisdiction of this court when called upon to determine points reserved in connection with specific findings given in answer to specific questions put at the trial.

I am of opinion that all the three reserved points in this case should be determined in favor of the plaintiff.

WILLIAMS, J.--Before proceeding to consider the questions reserved in this case for our opinion in their legal aspect, I desire to draw attention to some facts very material in my opinion, to their consideration. The pier on which the accident occurred is a pier vested by statute in the defendants. *Prima facie*, therefore, every person who goes upon that pier without permission, expressed or implied, of the defendants, is a trespasser. The defendants have power to frame bye-laws, amongst others regulating the admission of the public to this pier; but no such bye-laws were put in evidence at the trial, nor was proof given of the existence of any such by law. On this pier the defendants, for the proper conduct of their business, use and keep a machine called a "traveller." This machine is not dangerous, but perfectly harmless, in itself. It is, when not being used, fastened in its place by heavy clamps at the sides, each weighing from 28lbs. to 30lbs or more. These clamps fix down into slots, and these fastenings are amply sufficient to keep the traveller securely in its place, unless they are interfered with by being lifted out of the slots. Once, however, the clamps are lifted out of the slots, persons by pushing, or according to the evidence, a strong wind may set the traveller in motion. These travellers are not used on Sundays, and are supposed to remain stationary from Saturday night to Monday morning. The day on which the accident occurred was "Hospital Sunday," and it was proved at the trial, not objected to or questioned, that on that day, as well as on all other Sundays and holidays, the public are allowed without objection by the defendants to promenade up and down this pier. The plaintiff on the occasion referred to, though not a passenger by any of the defendant's trains, resorted to the pier as one of the public, in company with some other boys, for the purpose of his own recreation and enjoyment, and, as far as the evidence shows, for that purpose only. As long, therefore, as plaintiff was upon the pier promenading upon it and listening to the music, he was in the same position, enjoyed the same rights, and ran the same risks as any other member of that body of the public who resorted to the pier for the purpose of recreation and enjoyment. In other words, he was allowed to come upon and remain upon the pier by the tacit permission of the defendants. This is what is meant, and all that is meant by the finding of the jury, that "the plaintiff was lawfully upon the pier upon the day in question." Being there, he proceeded, as he says in his examination in chief, to sit upon the defendants' traveller for the purpose of listening to the music; for the purpose, according to his own repeated admissions in cross-examination, and to the evidence of the only companion of that day that he called, John Bruce (for he calls neither of the Shorts), of having a ride on the traveller while it was pushed by other boys. The machine had been put in its place on the Saturday night, and the clamps were down on the Sunday morning; so the reasonable inference is that these other boys had lifted the clamps out of the slots for the purpose of having rides upon the traveller. The plaintiff when so riding upon the traveller, or when so being pushed along seated on the traveller, got his foot crushed between the traveller and the rail, and now seeks to recover from the defendants damages for the injuries he thereby sustained. The contention of his counsel is that the defendants had a duty cast upon them *qua* the plaintiff and any other persons in the same position, to so securely fasten the clamps that they could not be lifted out of the slots by any mischievous person, and so render the machine capable of being easily set in motion. One of the main and principal questions therefore that we have to consider is whether the defendants owed any duty of this nature and of this extent to the plaintiff, assuming that he occupied no other position than that of anyone else of the promenading public. Upon the evidence, I think he occupied a different position, for upon the evidence I think he was *qua* the traveller a trespasser, if not by sitting upon it, at any rate by riding upon it. But assuming that he had been hurt by the machine when he was not either sitting upon it or riding upon it—a machine, it must be borne in mind, harmless and not dangerous in itself—having been set in motion by the wilful and unauthorised act or agency of other mischievous persons, could the defendants have been then held liable to the plaintiff for the injury he sustained? I think not. The plaintiff was at the utmost a bare licensee. He in common with the rest of the public was allowed by the defendants to use this pier for the purpose of recreation and enjoyment on sufferance--it was never even suggested at the trial either in the addresses of counsel for the plaintiff or in the evidence that he occupied any other position. There is not a particle of evidence to show that the defendants derived any gain from or had any interest in his use of it. It is important to bear this absence of evidence in mind, and still more important in this, as in all other cases, to well consider on whom is the onus of proof. If to succeed the plaintiff has to establish the fact that he upon this occasion occupied a higher position than that of a bare licensee of the defendants, upon him must most undoubtedly rests the onus or obligation of proving that he occupied that higher position. As he has wholly failed to adduce any proof of this description, I cannot upon the evidence regard him in any other light than at the best a licensee. Then if the machine be not dangerous in itself, and if the accident in question would not have happened had not this harmless machine been improperly and wilfully set in motion by the effort and contrivance of mischievous trespassers, can the plaintiff, a then licensee upon the pier, recover against the defendants compensation for the injuries he has sustained by that machine having been so set in motion? I think the cases of *Bolch v. Smith*, 7 H. and N, p. 736; *Southcote v. Stanley*, 1 H. and N, p. 147; *Zuchermann v. Davies*, L.R., 1 C.P.; and *Smith v. London and St. Katherine Dock Co.*, L.R., 3 C.P., p. 326 all show that he cannot. If the plaintiff had

sustained an injury on the pier by reason of a hole in the pier, of the existence of which the defendants were shown to have been aware, or of the existence of which they might have been presumed to know, the case would have been different. For in that event the licensee would have been injured by something in the nature of a dangerous trap known to the licensors. If I, out of purely philanthropic motives, throw open my grounds on Sundays to the public for their recreation and enjoyment, and I have a heavy stone roller stationary on my lawn, and through the unauthorised agency of some mischievous members of the public this roller is, after great efforts, set in motion, and pushed over the foot of another member of the public who is gazing at a shrub or a flower. I take it both common sense and law say I am not responsible But if one of the public on such an occasion were to injure his foot by placing it unintentionally on a man trap, of the existence of which I was aware, or may be presumed to be aware, then in such a case I would be responsible. Therefore taking an aspect of the facts of the case most favorable to the plaintiff, but not warranted, I think, by the evidence, he must, in my opinion, fail in the action. *A fortiori* must he fail if he were, what I think the evidence discloses he was, a trespasser, as regards the machine which injured him. I very much doubt whether he had an implied permission even to sit upon the traveller when stationary. He certainly had no manner of right to use it for the purpose of having a ride upon it. It is impossible, I think, for any reasonable man to read the plaintiff's evidence as a whole, examination in chief and cross-examination, and to come to any other conclusion than that he was, with other boys, playing with this machine for the purpose of having rides upon it. The only other witness he calls upon the point is John Bruce, and his evidence impels the mind to the same conclusion. In neither aspect, therefore, is the plaintiff, in my opinion, entitled to succeed in this action, and the answer I give to the first question reserved for the opinion of the Court is "there was no evidence of negligence on the part of the defendants fit or proper to be submitted to a jury. The second question should not have been reserved, as it is merely an argument for, and is included in, the first. In answer to the third question reserved I think paragraph 3 of the defence was proved, and, notwithstanding the findings of the jury, I am inclined to think that paragraph 5 was proved, except in so far as it alleges that the machine was improperly set in motion by the plaintiff, and the plaintiff was warned. As the Court is only asked to, and consequently has only jurisdiction to answer the questions reserved for their consideration. I express no opinion upon other points which were suggested duri g argument; as. for instance, that many of the findings of the jury were either unsupported by, or directly opposed to the evidence, points which would have been eminently proper for consideration had this been, which it is not, a motion for a new trial.

HOLROYD J.—As to the first point reserved for the consideration of the Court, I am of opinion that there was no evidence of negligence. The jury found that the plaintiff was lawfully upon the pier. I must take this to mean that he was there by sufferance. If it meant anything more, there was no evidence to support the finding; and I must consider the jury, when I can, to have found according to the evidence. The pier is part of the property vested in the commissioners for the purpose of the Act No. 767, cited as the Victorian Railways Commissioners Act 1883 (Sec. 40). By this Act the Commissioners are empowered to make byelaws for a great variety of objects, and amongst others for regulating the admission of the public to their piers. No such byelaw was produced at the trial. The act furthermore incorporates section 155 of the Public Works Statute 1865, by which it is enacted that any person willfully trespassing upon any pier, *i.e.*, any pier belonging to the commissioners, shall forfeit a sum not exceeding £20. Bands were playing on the pier on Hospital Sunday. The plaintiff. a lad of 10, went there to listen to the music. He had not gone there upon any business, nor had he been invited to go. The fact that bands played, and that the public were in the habit of resorting freely to the pier and promenading up and down, was evidence to show that the plaintiff, as one of the public, was using the pier by tacit permission of the defendants; but nothing more. Conceding that he was lawfully on the pier, he was not lawfully upon the traveller. The jury have not so found, and could not in my opinion, have properly so found. The traveller is a machine used by the defendants in connection with the purposes for which the pier is vested in them. The plaintiff had no right to meddle with it, not even to touch it, much less to mount upon it, and if he had not mounted the accident would not have occurred. The plaintiff became a trespasser when he sat upon the traveller, and the boys who put the traveller in motion trespassed in so doing. The jury considered that the traveller had not been securely guarded or fastened so as to prevent it from being moved by persons meddling with it and not authorised to set it in motion, and that when in motion it was dangerous to persons on the pier. I must assume they meant dangerous to persons sitting on the traveller; for, if they meant that the traveller set in motion unexpectedly might be dangerous to persons standing or walking unsuspiciously between the rails, although I can understand their opinion, it is quite inapplicable to the circumstances of the case. The result is at the utmost that one trespasser was injured by the act of another trespasser by the aid of a piece of machinery, perfectly harmless if left alone (unless, perhaps, in a gale of wind), and with the only dangerous quality of which, if it had any, the injured person was well acquainted. The plaintiff knew that the traveller could be easily moved, for he had seen the other boys riding before he rode in his turn. Upon the foregoing state of facts I do not think the defendants lay under any obligation to the plaintiff to protect him from the consequences of the machine being set suddenly in motion. They would not be justified in laying a trap for him. If, for instance they had knowingly per-

mitted a plank apparently sound, but so rotten in fact that it was unsafe to tread upon it, to remain in the flooring of the pier, and the plaintiff having trodden upon it his foot had slipped through, and he had been thereby hurt, I think the defendants would have been liable. The damage would not have been obvious, and the plaintiff would not have been a trespasser. It is not absolutely necessary to decide whether the defendants could have been found guilty of negligence if the plaintiff had not been himself trespassing, but had been injured by the act of a trespasser; as if he had been standing in front of the traveller, and another boy had pushed it suddenly upon him. Even then I think there is no principle on which the defendants could be deemed responsible. A mere license to walk upon a man's ground for the recreation of the licensee cannot, in my opinion, impose upon the owner of the land any obligation to shield the licensee from the consequences of the unauthorised act of a third party meddling with a piece of machinery which may happen to be upon it. (*Indermaur v. Dames* L. R., 1 C. P., 274; *Smith v. London & St. Catherine Dock Co.* L. R., 3 C. P., 326; *Sullivan v. Water*, Ir. C. L. R. 460). 2. Admittedly the second question should be answered in the affirmative. 3. With respect to the third paragraph of the defence the defendants were not in my opinion bound to guard the traveller, or to fasten it, except so far as to prevent it from being moved accidentally. The jury found in effect that the traveller had been so fastened by the defendants' servants, but that the fastenings had been removed by unauthorised persons. With respect to paragraph 5 of the defence there is no evidence that the plaintiff, or any of the other children, actually removed the clamps which fastened the traveller, and there is evidence on which the jury might reasonably have come to the conclusion that the plaintiff and other children were not warned by the defendants' servants against interfering with the machine, but otherwise I think the 5th paragraph was fully proved. The 6th 7th 8th and 9th answers of the jury are in my opinion, against evidence, but for the purpose of my judgment I have accepted them as strictly accurate.

(Before Higinbotham, C.J., Kerferd and a'Beckett J.J.)

FORT v. LANE & Co

Act No. 953 (J.P. Act) section 148—Special Case—When to be stated—On an appeal from Petty Sessions the Court of General Sessions has no jurisdiction to state a case for the Full Court under section 148 before such appeal has been heard and determined.

Special case stated by the Chairman of General Sessions. Fort, a boy of thirteen years of age was convicted at Petty sessions of unlawfully assaulting a child six years of age and ordered to be confined in the Reformatory. On appeal and without going into the facts, the learned judge at General Sessions stated a case specially for the opinion of the Full Court as to whether any appeal from an order committing a child to the Reformatory lies to the General Sessions and adjourned the hearing.

Donovan appeared for the prisoner.

Walsh for the respondents.

Donovan took the preliminary objection that the Chairman below had no jurisdiction to state a case before he had first heard and determined the case, section 148 Act No 953. This Court will not give a decision on any matter not final.

Per Curiam.—We decline to hear this case on the ground that the case has been stated at an improper time.

Appeal dismissed with costs.

SUPREME COURT SITTINGS.

(Hodges, J.)

ARVIER v. EASTWOOD.

Contract for sale of land.—Production of title.—Reasonable time.

A contract for the sale of land contained amongst other conditions the usual one which provides for the production of the title and statement of requisitions, &c. The following condition also was inserted:—"The "vendors are applying to bring the land under the "Transfer of Land Statute and the time for making "requisitions shall be extended to run from the date "of production of such title and not from the day of "sale." Held that the result of the joint operation of the two clauses, was to give the vendor a reasonable time to bring the land under the Act.

The purchaser, however was not bound to wait until

a prior vendor, between whom and himself there existed no contract, although acting with reasonable diligence, might bring the land under the Act.

Action by Charles Auguste Arvier against J. H. Eastwood and Company and W. Whitely and J. Gibson, to have, in effect, an agreement for the sale of certain lands therein described, rescinded. The contract was dated the 19th October 1888. the consideration was £714 to be paid by a deposit of £71 8s. 0d. in cash, the balance by promissory notes in equal amounts at 6, 12, and 18 months with interest at the rate of 6 per cent per annum added; the deposit was duly paid and the promissory notes given. Clause 5 of the conditions of the contract provided that "The certificate of title to the property sold shall be pro- "duced to and a copy thereof may be made by the "purchaser or his solicitor on application in that be- "half to the vendor or his solicitor and the purchaser "shall within ten days from the day of sale deliver "to the vendor or his solicitor a statement in writing "of all objections or requisitions (if any) on the title "or concerning any matter appearing in the particu- "lars or conditions and in this respect time shall be of "the essence of the contract. All objections or requi- "sitions not included in such statement to be de- "livered within the time aforesaid shall be deemed ab- "solutely waived by the purchaser and the purchaser "shall be considered as having accepted the title and "it shall be lawful to pay over and deliver to the "vendor all sums of money paid and promissory notes "given by the purchaser on account of the purchase "money without being liable to any action or other "proceeding for recovery of the same." Clause 13 of the conditions provided that "The vendors are "applying to bring the land under the Transfer of "Land Statute and the time for requisitions shall "be extended to run from the date of production of "such title and not from the day of sale." Clause 11 provided "that time shall be considered the essence "of the contract." At the time the contract was entered into the defendants were possessed only of an equitable interest in the land transferred, the legal estate being in their immediate vendor. It was, consequently, contended on behalf of the plaintiff that as the defendants had not the legal estate, they were unable to carry out the provisions of clause 13 above mentioned. The defendants replied that the fact of their being simply equitable owners was well known to the plaintiff at the time the contract was entered into and that an application was being made on their behalf to bring the law under the operation of the Act by the person having the legal estate. The plaintiff further alleged that he had more than once unsuccessfully applied to the defendants for production of the title and that inasmuch as the defendants had been guilty of unreasonable delay in doing so, he was entitled to rescind the contract which he accordingly did by notice on the 10th. December 1888. He claimed by his statement of claim, return of the deposit, return of the promissory notes, an injunction to restrain the defendants from negotiating the notes, and damages for the expenses incurred in efforts to obtain production and inspection of the title £20, with other relief. The defendants, Whitely and Gibson, were joined as being the agents of the actual vendor, Eastwood and Co., and the holders of the promissory notes.

Topp (*Sheils* with him) for the plaintiff;—Time is made of the essence of the contract by the parties themselves: therefore the plaintiff had the right to rescind on non-production of the title; the joint operation of conditions 5 and 11 produce this result. [*Per Curiam*, The only title the vendor covenants to produce is a certificate of title.] Even admitting that, when a person sells a property which he is not able to convey, the purchaser may repudiate the contract and is not bound to wait to see if the vendor can induce some third person to obtain a legal title. *Forrer v. Nash* (36 Beav. 167); *Hoggart v. Scott* (1 R. and My. 293 and at 295). As to the question of what is a reasonable time—v. *Venn v. Cattell* (29 L.T. N.S. 469); *Matthews v. James.* (8 V.L.R. (E) 188).

Neighbour, for the defendants;—No time is specified within which title is to be produced: therefore the defendants are entitled to a reasonable time. If the vendor can make a good title even at the time fixed for completion he would be entitled to specific performances. *Mortloch v. Buller* (10 Ves. 315). If the purchaser intended to rely on the fact that the vendor had merely an equitable title, he should have done so immediately on ascertaining that fact; Dart V. & P. 1058 (5 Ed.)

His Honor, after stating the facts, went on to say:—In the view which I take of this case, the vendors are bound by their statement that they were making an application to bring this land under the operation of the Land Transfer Statute. Therefore the purchaser would have a right to expect that when the title was obtained it would be in the name of his vendor. The 13th condition gives the vendor a reasonable time to bring the land under the operation of the act in his name, and the purchaser, by virtue of that condition, contracts "that the vendor" shall have a reasonable time for the accomplishment of that object. But he does not contract that there shall be a reasonable time for some other persons to obtain a certificate of title in their names. That being so, the purchaser, when he finds that he would be called upon to wait is entitled to rescind and he is not bound to wait until the title comes into the name of his immediate vendor. Accordingly I must give my decision in the plaintiff's favour, but I shall allow no costs. Judgment will be entered for the plaintiff for £71 8s. 0d. and £2 14s. 6d. interest together with £20 the costs of investigation of title, the promissory notes to be returned to be cancelled. As Whitley and Gibson appear by the same counsel as the principal defendant, I shall allow them no costs.

Solicitors for plaintiff, *Gillman*; for defendants. *Brahe and Gair.*

IN CHAMBERS

(Before a'Beckett J.)

MACKINNON v. JENKINS.

Rules of Supreme Court 1884 *Order XIX.* r.r., 13. 17, 19 — *Defence — Embarrassment — A denial of "the whole of the allegations in the statement of claim" is a good defence.*

2nd, 5th July.

Application on behalf of the plaintiff to have a paragraph of the defence struck out as being embarrassing, evasive, and contrary to the provisions of Order XIX. rr.; 13, 17, and 19.

Mr. Box in support.

Mr. Weigall to oppose.

The matters in issue appear sufficiently from the judgment.

HIS HONOR delivered the following written judgment :—The statement of claim is in four paragraphs. Paragraph 1 of the defence is as follows—"The defendant denies the whole of the allegations in the statement of claim." The plaintiff has applied to have this paragraph struck out as embarrassing, evasive, and contrary to the provisions of Rules 13, 17 and 19 of order XIX. Counsel cannot suggest how it can embarrass or what it can evade, but he contends that it does not comply with Rule 17 or Order XIX which requires that each party must deal specifically with each allegation of fact and that under this Rule the defendant must repeat every statement which the plaintiff has made for the purpose of contradicting it. This interpretation would involve useless prolixity and I am glad to have authority for not adopting it. *In Virtue v. Young* 6. A.L.T. 204, a similar objection was raised and overruled. The only difference between that and the present case is that as part of the statement of claim was admitted in *Virtue v. Young* the denials were limited to certain paragraphs as to which the defendants said—"They deny each of the allegations of the—paragraph. The rule and the cases bearing on it were fully considered by *Williams J.* who said that to give the rule the construction contended for, would make defences "untolerably prolix, cumbersome, and confusing" I agree with his conclusion and his reasons. I am under the impression that there have been other decisions in this court to the same effect, but I cannot find any report of them. It is conceded that denying "the whole of the allegations" in the present case is equivalent to denying "each of the allegations" which would be the more correct form of denial, but it is said that under Rule 17 this would not be sufficient. I hold it sufficient and dismiss the summons with £3 3s. costs and certify for counsel. I may add that the form of denial sanctioned by *Virtue v. Young* and by my present decision was allowed by *Mr. Justice Molesworth*, under the old equity practice which required that a defendant should answer each paragraph of the bill as if specifically interrogated with respect thereto. It was enough to say "the defendant denies each of the allegations of paragraph——" without repeating or dealing separately with the allegations contained in the paragraph.

[The same point was discussed in *Blackburn v. Mayor etc. of Melbourne* 6 A.L.T. 154 ; *Hasse v. Eicke*, 6 A.L.T. 190 ; and *Knight v. Bell*, 8 A.L.T. 165 Ed.]

(Before a'Beckett J.)

IN RE THE CO-OPERATIVE COLD STORAGE COY., LIMITED.

Companies Statute 1864, (No. 190) *Sch. 7 Rule 2— Petition where the registered office of a Company is closed and the Company has ceased to carry on its business a petition for winding up may be served by leaving a copy at the Registered Office.*

Application on behalf of the petitioning creditor for an Order directing the mode in which the petition for winding the Company up should be served.

HIS HONOR delivered the following written judgment. In this matter an application has been made to me for an order, directing the mode in which the petition for winding up shall be served, mentioning *Mr. Charles Botte*, described as "Secretary of the Company "as a proper person to be served, the registered office of the Company having been closed and the Company having ceased to carry on its business. Special orders for service can be made in these matters, see *Re National Credit v. Exchange Company* XI. W.R. 161. Rule 2 of Schedule 7, providing for service is ambiguous as to what is requisite in a case of this kind and under the circumstances service by merely leaving the notice at the registered office might have been held sufficient ; see, *London v. Westminster Wine Coy.* XII. W.R. 6. as however the petition has chosen to ask for a special order. I will make one directing that service by leaving a copy of the petition at the registered office and by serving a copy on *Mr. Botte* be deemed good service.

(Before a'Beckett J,)

ELLIOTT v. POUNDS

12th July.

Rules of Supreme Court, 1884, *Order XIV.* r.1— *Affidavit—The affidavit required by rule 1 of Order XIV may be made by anyone who can swear positively to the facts verifying the cause of action and the Rule is sufficiently complied with by the deponent stating that in his belief there is no defence.*

Application on behalf of the plaintiff under Order XIV r. 1.

The writ was specially indorsed for money payable under a contract of sale of land. The solicitor for the

plaintiff swore the affidavit in support in which he stated that in his belief there was no defence to the action by the defendant. It appeared from a affidavit sworn that some arrangement had been made as to the application of the purchase money which it was alleged had not been carried out. The solicitor for the plaintiff filed an answering affidavit in which he traversed the statements made in the defendant's affidavit

Mr. Hood in support.

Mr. Isaacs to oppose:—There is a technical objection to this application viz:—that the affidavit in support is not made by the plaintiff but by one who does not appear to know all the facts. The rule must be strictly observed before your Honor has jurisdiction *Kiely v. Massey*, L. R. Ir. 6 Ex. D 445; *Hong Kong v. Gritton* 12 V. L. R. 128 which decides that the affidavit must be sworn by the plaintiff or by one who knows all the facts.

Mr Hood in reply:—The solicitor swears positively as to all the facts. The answering affidavit cures any defect as the stringency of the Rule was only meant to meet cases where the defendant does not come forward. In *Kiely v. Massey* there is not one word said in the judgment as to this matter A solicitor may in many cases be able much better to state his belief as to a defence than the party himself.

His Honor said:—I am inclined to think that the affidavit is sufficient because it appears that the person who makes the affidavit can swear positively to the facts verifying the cause of action and if he can do so the Rule is sufficiently complied with by his stating that in his belief there is no defence. If there were any reason to suppose that the person making that statement was ignorant of the facts then the judge would require an affidavit from the plaintiff himself, but I do not think this objection to the form of the affidavit is any ground for refusing the summons However I refuse the application as the action may involve important questions and as to the relations between vendor and purchaser I think it better that the matter should not be dealt with under this summary procedure.

Costs to be costs in the cause.

Solicitors, for plaintiff; *Davies & Campbell*; for defendant; *O'Hea.*

SITTINGS IN BANCO.

(Before Higinbotham, C.J., Kerferd and a'Beckett, J.J.)

Finlay v. the Queen.

March 13, 26.

Duties on Estate of Deceased Persons—Act No. 388 s 23—13 Eliz. C. 5—Intent to evade payment of duty. The words in s 23 of the Duties on the Estates of Deceased Persons Statute 1870 *"with intent to evade etc.," should receive, so far as regards the proof necessary to establish intent a similar interpretation to the words "to the end purpose and intent" etc., in the Statute* 13 *Eliz. C.* 5.

Where therefore a man does an act which taken in connection with the other facts of the case must necessarily operate as an invasion of payment of duty under the Act, he must be taken to have intended to evade payment, and it is not essential that there should be any direct and positive proof of an actual or express intent.

Kerferd, J., dissented from the majority of the Court on the facts.

Special case stated for the opinion of the Full Court. The plaintiffs Phoebe Finlay and William MacMurtrie, executrix and executor of the will of John Finlay sought to recover a sum of £1643 12s. 8d. which had been paid by them under protest, on a certain grazing property known as "Wyuna" and which the Crown contended formed part of the testator's estate. The facts stated in the Special Case appear sufficiently in the judgments.

Dr. Madden and *Hood* (for the petitioner.)

We submit that all the facts show a bonâ fide intention on the part of the testator to make a provision for his children. The property was managed as a whole because it was the most profitable way of working it. There was no division of profits or accounts rendered by the testator because it had not commenced to pay. He intended his sons to be the absolute owners. No consideration is necessary provided the transfers were bonâ fide.

Higgins and *Box* (for the respondent.)

We present our case in two aspects. First, we say the facts prove an intent to evade under Sec 23 *Duties on the Estates of Deceased Persons Act.* And second, this is a voluntary settlement within Sec 20 of the Act and ought to have been registered. The testator must be taken to have intended the necessary consequence of his acts. The effect has been the same as if he had devised the property by will. On the second point, these transfers are settlements. A settlement is defined in *Colechin v. Wade* 3 *V.L.R.E.* 266. On the facts, the intent to evade is clear. It was never intended to benefit the children until the testator's death.

Madden in reply. We are charged with fraud and the onus is on the Crown to prove it by the clearest evidence. Ex parte Abbott 15 Ch. Div. 455 *Macbeth v. Ashley* L. R. 2 Sc. App. 359 per *Lord Selborne.* The testator did not remain substantially owner. Any of the sons might have sold or if any of them had married the father could not have defeated his original transfers. *Chapman v. Robertson* 13 V.L.R. 682. These transfers do not come within Sec 20 or Sec 23.

cur. adv. vult.

The judgment of the Court was delivered on March 26th.

Kerferd, J.:—The petitioners claim £1,643 12s. 8d. for money received by Her Majesty to the use of the petitioners. This money was paid under the provisions of the *Duties on the Estates of Deceased Persons*

Statute 1870, (No. 388,) section 12, which provides:—"No probate letters of administration or rule to administer shall issue from the master's office until the duty or fee, as the case may be under this Act, has been paid." The petitioners were therefore compelled to pay this money before probate could issue. The special case provides that the notes of evidence taken by Mr. Justice *Molesworth* in the case of *Finlay and the Land Tax Act* 10 V.L.R. 68 and the affidavits to be used in that cause are to be taken in this case. (His Honor here stated the facts.) The settlor died on the 15th. August, 1887, and the petitioners are the executrix and executor of his estate. "The Court is to draw all inferences of fact as a jury might." The question for the opinion of the Court is whether the land included in the certificates of title issued to the said children of the testator, John Finlay, as aforesaid, should be deemed to form part of the estate of the said John Finlay for the purpose of being made liable to pay duty under the provisions of the *Duties on the Estates of Deceased Persons Statute* 1870. If the Court answer the above question in the affirmative then judgment to be entered for the respondent, with costs of suit. If the Court answer the above question in the negative then judgment to be entered for the petitioners for £1,643 12s. 8d. and costs of suit. The contention for the respondent is that the conveyances made by the settlor on the 19th and 21st April 1883 were made "with intent to evade the payment of duty" which would become payable under the provisions of the *Duties on the Estates of Deceased Persons Statute* 1870. Under section 23 of that Act "any conveyance or assignment, gift, delivery, or transfer of any estate. . . . . to take effect upon the death of the person making the same, shall be deemed to have been made . . . with intent to evade the payment of the duty thereunder." If these conveyances had been made by the settlor for the purpose of evading the land tax I would have said that, being made for an unlawful purpose, they could not now be made available as an answer to a claim for probate duty. There is, it appears to me, a broad distinction between making an honest, *bona fide* transfer to avoid liability under an act of Parliament, and making a sham transfer to evade liability under it. It is a rule of construction that what is not prohibited by an act of Parliament is contemplated as a thing which may be lawfully done under it. (See *Ramsden v. Lupton* L.R. 9 Q.B. 17). Neither the *Land Tax Act* 1877 nor the *Duties on the Estates of Deceased Persons Statute* 1870 contains provisions prohibiting *bona fide* transfers. The *Land Tax Act* makes provision for a *bona fide* transfer for valuable consideration being made. An honest mistake as to what was a valuable consideration ought not to make the transfer an illegal act (if otherwise *bona fide*) and of no effect as a voluntary transfer under the *Duties on the Estates of Deceased Persons Statute* 1870. *In re Johnson* (20 C.D. 394), *Fry*, J., held that it was a commendable thing for the settlor to avoid the liability of heavy succession duty by transferring the property to her daughters on condition that they would pay the debts on it and maintain her during her life, instead of leaving it to them by will, when succession duty would have had to be paid. Now, in this case, when the land tax case came before the Full Court on appeal from Mr. Justice *Molesworth*, *Holroyd*, J., said on this point:—"He (the settlor) never tried to evade the tax; that term should not be applied. He tried to avoid it; that he had a perfect right to do. There was nothing dishonest or immoral in what he did." (*In re Land Tax Act exparte Finlay*, 10 V.L.R. Eq. 68). In that case the transfers were held to be made without valuable consideration, as required by the *Land Tax Act*. I would say a voluntary conveyance, although not sufficient to get rid of the settlor's liability under the *Land Tax Act* 1877, would, if made *bona fide* by the settlor and given effect to during his lifetime, be an answer to a claim for duty under the provisions of the *Duties on the Estates of Deceased Persons Statute* 1870. The mischief aimed at by the latter act is to prevent an evasion of the payment of duty by a settlor making a conveyance not to take effect until after his death instead of disposing of his property by will, when the duty would become payable before probate of the will could be obtained. We are by the case to draw inferences of fact from the state of facts submitted to us, and to reach the conclusion as to what was in the mind of the settlor at the time he made the several conveyances referred to. Did he make them with the intent to evade duty under the provisions of the *Duties on the Estates of Deceased Persons Statute* 1870? If he did, then under the provisions of Section 23 of that act the lands so conveyed are to be deemed to be part of the settlor's estate and liable for duty. I have already said, that in my opinion, the making of the transfers was not in itself illegal, because the effect of the transfers was to avoid payment of the land tax and also of probate duty. Nor have they been made with the intention to defeat and delay creditors within the provisions of the statute of 13 *Eliz.* C. 5, so as to bring them within the authorities upon that statute, which showed that fraud might in certain cases be inferred from the making of the deed. No inference as to the intention of the settlor can therefore be drawn from the fact of the making of the transfers. We have no means of ascertaining what was in the mind of the settlor, and we can only reach a conclusion as an inference to be drawn from the whole of the facts and circumstances. I would say that to contradict the account given by the settlor himself of his intentions in making the transfers, and to reach the determination that he intended to evade the payment of duty by means of those transfers, the facts and circumstances must be of such a character as to lead the mind to the irresistible conclusion that what the settlor pretended to do was a mere scheme and device to make believe that he was honestly making a provision for his children by a disposition of his property in his lifetime whereas in truth he was doing nothing of the kind. The rule as to circumstantial evidence, from which an inference may be drawn, will be found laid

down in a number of authorities, and to be substantially as follows :—"Where a theory has to be sustained by circumstantial evidence, all the facts proved must be consistent with the theory, but there must be also some one substantial, credible fact inconsistent with the contrary." Per (*Willes*) *J.* in *The Great Western Railway Co. v. Rimell*, 27, L.J., C P. 205. Therefore to support the theory of the respondents, that the settlor intended to evade the payment of duty, there must be according to that rule, "one substantial credible fact inconsistent with the contrary" of that proposition. The learned counsel for the respondents admitted, in reply to a question put by me, that the facts were consistent either with the contention of the petitioners or with that of the respondents. The case on this admission would, therefore, not fall within the rule. I think the learned counsel was right in making that admission. If the settlor is disbelieved, all the facts and circumstances relied upon by the respondents in the case are consistent with the "Wyuna" Estate being entire, and being the sole property of the settlor up to the time of his death, and therefore that those transfers were made with the intent to evade the probate duty. If, on the other hand, he is believed, all the facts and circumstances are consistent with the scheme of buying the property in the manner described by the settlor and settling it in the manner stated by him, and with its being an honest *bona-fide* family settlement. I would say this with regard to the facts relied upon by the respondents as evidence of their contention with reference to the working of the estate as an entire property. that if each of the children had acquired the land by purchase or selection, it is general knowledge among those acquainted with grazing in this country that the most profitable way. and possibly the only way to work fourth-class land comprising an estate like the one under consideration, would be to work it as an entire property with one set of working expenses. The system of working properties whether obtained by purchase or selection, by members of a family as one property with a common fund —all profits beyond what is actually required for bare necessaries to be set apart for payment of the united debt—will be found to be of frequent occurrence in this country under the *Land Act* and the *Land Tax Act*. In this case, apparently, the scheme would not have succeeded if the settlor had not fed the estate with money from time to time to enable it to be carried on. If the properties had been cleared of debt in the lifetime of the settlor, and the scheme worked out as planned by him, and after that "no division of profits or earnings as for separate properties had ever been made or rendered as for separate properties," I should have strongly doubted the *bona fides* of the transaction. On appeal from the judgment of the learned primary judge, the question of the *bona fides* of the transaction was considered by this Court on substantially the same facts we have now before us. Mr. Justice *Holroyd*, who delivered the judgment of the Court, said:—Assuming, as in our opinion we may safely assume, upon the evidence presented to us, the *bona fides* of Mr. Finlay's transfers to this extent, that he could not revoke them and had no intention of trying to do so, and that there was no trust or understanding between him and his children beyond that which he himself disclosed, *viz.*, that his stock should depasture over the whole of the land, and that the profits should be devoted primarily to the discharge of the interest on the mortgages, and then of the principal. . . ." Five years have elapsed since that judgment was delivered. Mr. Finlay, the settlor, has since died. No alteration has been made in the properties, except, perhaps, the payment off of some portion of the debt. No new light has been thrown on the transaction (saving the extract from the will) since the facts were considered by this Court. I have reached the same conclusion as this Court did on that occasion. I feel that I may "safely assume upon the evidence presented to us the *bona fides* of Mr Finlay's transfers." I am of opinion that the transaction was an honest *bona fide* settlement, and that the settlor did not make the transfers referred to with the intent to evade the payment of probate duty. I answer the question put in the case in stated in the negative.

HIGINBOTHAM, C. J. gave the judgement of himself and A'BECKETT, J. as follows:—The question which we have to determine upon this special case whether the land included in four certificates of title issued on April 25, 1883 to four of the children of the testator, John Finlay, and which had been transferred to them by duly registered transfers on the 19th of April, 1883, in consideration of natural love and affection, should be deemed to form part of the estate for the purpose of being made liable to pay duty under the provisions of the *Duties on the Estates of Deceased Persons Statute*, 1870. The court is empowered by special case to draw all inferences of fact as a jury might. The testator executed his will on June 1, 1887. He died on August 15, 1887. It is contended for the Crown that the testator executed the transfer to his children with intent to evade the payment of duty under the *Duties on the Estates of Deceased Persons Statute*, 1870. The 23rd section provides that "If any person has made or shall hereafter make any conveyance, or assignment, gift, delivery, or transfer of any estate, real or personal or of any money or securities for money in anticipation of the passing of this act, or with intent to evade the payment of duty thereunder in case such person should die, the property comprised in any such gift, delivery or transfer shall, upon the death of such person, be deemed to form part of his estate for the purpose of this act upon which duty shall be payable under this act." The property included in the four transfers was sold to the testator by Sir James McBain, and was transferred by him to the testator immediately before the transfers to the children of the latter. The transfers by the vendor to the testator were subject to a mortgage from Sir James McBain to Edward Keep to secure the sum of £25,000. The transfers by the testator to his children were subject to this mortgage and to another mortgage from the testator to Sir James McBain for £42,678 3s. 5d. The testator purchased this

property avowedly for his children, four of whom were then under age. He required the vendor to execute the contract in favor of and to transfer to his children as the purchasers, and, when the vendor declined to sell direct to the children, and insisted on treating the testator as the purchaser, the latter, immediately after the transfer to himself, executed the transfers to his children. It may have been the intention of the purchaser that his children should ultimately become the owners. But it must be concluded, we think, with certainty from the acts of the testator that he also intended that while his children should appear to be the real owners they should take no real present interest in the property, and that he should retain complete power of disposition of it in himself. This intention was manifested from the first and continued down to the time of his death. He instructed his agent to divide the land among his children, but no dividing fences were erected. The propertles were managed as a whole. No division of profits or earnings as for separate properties was ever made. No accounts were made or rendered as for separate properties. The stock depastured on all the properties belonged wholly to the testator. Tbe proceeds and earnings of all the properties were paid into one account and in the name and under the absolute control of the testator, and, together with monies provided by him, were applied to the payment or interest due on the mortgages. By his will, executed shortly before his death, and which has bee i added by the consent of both parties to the documents set forth in the case, the testator directed that before any division of property should be made among his children the land given during his life to each child should be valued, and the value of each child's land should be deducted from the share of each under the trusts of the will. The question presents itself what was the motive and intention of the testator in making at this time three separate transfers to his children, who, it is clear, were not to gain any present advantage from them? One object of the testator appears to have been to ovade, or, at all events, to avoid the provisions of the *Land Tax Act* 1877. Of this the papers included in the special case furnish direct, and, to our minds conclusive evidence. Immediately after the transfers in 1883 the testator forwarded to the registrar of land tax sigued notices and acknowledgments of the several transfers, and applied that his name might be removed from the land tax register. His application was supported by a statutory declaration, dated July 1, 1883, that he had by the said transfers *bona fide* parted with all his interest in the lands to the several transferees, and that they were then the absolute owners and proprietors thereof. The registrar determined to maintain his name on the register, and the testator then made an affidavit that the transfers had been made *bona fide* and for valuable consideration and that he was not then the owner, beneficial or otherwise, of any of the lands so transferred. He appears to have relied upon the fact that each of the transferees was bound by the transfers and provisions of the *Transfer of Land Statute* to pay the interest on the mortgages, and to indemnify him against the principal sums secured by the mortgages and against liability on the covenants. But it was held by the Court, in *re Land Tax Act* 1877, *exparte John Finlay*, 10, V.L.R. E 68. that this obligation of the transferees did not constitute a valuable consideration under the fourth section of the *Land Tax Act* 1877, and that such a dealing by the father of a family in favour of his children was not a transfer *bona fide* and for valuable consideration under that act. It has been contended, however, that the unsuccessful attempt of the testator to escape payment of the land tax is no evidence that he intended by these transfers to evade the payment of duty under the *Duties on the Estates of Deceased Persons Statute* 1870. We think this may be conceded, and if proof of an actual and express intent to evade the payment of duties under the last-mentioned act were necessary, the facts stated in this case, while affording strong grounds of suspicion, would not, in our opinion, justify us in concluding the existence of such actual and express intent. But we think that such proof is not necessary, and that proof of constructive intent issufficient. The testator must be held to have known at the time he made these transfers what would be the natural and necessary consequence of his act. He must be taken to have been aware that as he was postponing to a future and undetermined time the actual and effectual transfer of these lands to his children, the execution of the transfers would in the event of his death before that time arrived necessarily operate (supposing the transfers to be effectual) as an invasion of the act. We think that the words of the 23rd section, "with intent to evade the payment of duty," should receive, so far as regards the meaning of and the proof necessary to establish intent, a similar interpretation to the words "to the end, purpose, and intent to delay, hinder, or defraud creditors" in the statute 13 *Eliz*, c 5. In *Spirett v. Willows* 3 D. J. & S., 293, 34 L.J., Ch. 367, the Lord Chancellor *Westbury* intimated an opinion that an express intent to delay, hinder, or defraud creditors must be proved in certain cases coming within the statute of Elizabeth, or that the settlor must be shown to be reduced to a state of insolvency, in which case the law would infer that the settlement was made with such intent, and was therefore fraudulent and void. In a subsequent case, *Freeman v. Pope*, L.R., 5 Ch. 538, *Hatherley* L.C., referring to the same statute, observed—"The question would never be left to a special jury to find *simpliciter* whether the settlor intended to defeat. hinder, or delay his creditors without a direction from the judge that if the necessary effect of the instrument was to defeat, hinder, or delay the creditors, that necessary effect was to be considered as evincing an intention to do so." . . . "If it be the necessary consequence of the settlement, supposing it effectual, that some creditors must remain unpaid, it would be the duty of the judge to direct the jury that they must infer the intent of the settlor to have been to defeat or delay his creditors, and that the case is within the statute," p. 541. "It seems to

me that the difficulty felt by the Vice-Chancellor arose from his thinking that it was necessary to prove an actual intention to delay creditors where the facts are such as to show that the necessary consequence of what was done was to delay them. If we had to decide the question of actual intention, probably we might conclude that the settlor when he made the settlement was not thinking about his creditors at all, but was thinking only of the lady whom he wished to benefit, and that, his whole mind being given up to considerations of generosity and kindness towards her, he forgot his creditors had higher claims upon him, and provided for her without providing for them," p. 543. And see per *Kindersley*, V.C., in *Jenkyn v. Vaughan*, 3 Drew, p. 419. We should not infer from the facts stated in this case that the testator when he executed these transfers was thinking only of his children, and that he had no actual intention of evading or avoiding the operation of this law. But it is unnecessary to decide the question whether he had or had not such actual intention. We come to the conclusion that in making the transfers he did an act which, taken in connection with his subsequent control of the property comprised in the transfers, necessarily operated as an evasion of payment of duty, and we, therefore, find that he made the transfers with intent to evade the payment of duty. Upon this ground we are of opinion that the land included in the certificates of title issued to these children must be deemed to form part of the estate of the testator, John Finlay, for the purpose of being made liable to pay duty under the provisions of the *Duties on the Estates of Deceased Persons Statute* 1870. Judgment will accordingly be entered for the respondent with costs of suit.

Judgment for the Crown with costs.

(Before Williams, Holroyd and Kerferd, J.J.)

FERRON v. WILKINSON.

May 3rd. 1889.

Justices of Peace Act 1887 (*No.* 953) s.s. 82, 91—*When a Court of Petty Sessions has no jurisdiction to hear a case, they have no power to dismiss it but should decline to hear it and strike it out.*

Semble that in such a case, the justices cannot award costs.

Order to Review. The complainant Perron sued the defendant Wilkinson at the Court of Petty Sessions at Seymour for L136 2s. 6d. money due for use and occupation of a house, work and labour done, etc. In order to bring the case within the jurisdiction of the justices the complainant in the bill of particulars attached to the summons gave the defendant credit for a sum of L93 1s. 3d. alleged to be due by the complainant to the defendant. It was objected at the hearing that this could not be done and that as the set off exceeded their jurisdiction the justices could not hear the case. The objection was allowed and the justices dismissed the case with costs.

Shiels for the complainant moved the rule absolute. The justices should not have made an order for they had no jurisdiction. They should not have dismissed it but simply have declined to hear it and struck it out. By dismissing it they prevent the complainant bringing an action for the amount he claimed in another Court. *Conway v. Richardson* 10 L.T.N.S. 853. *Fraser v. Fothergill* 14 *C.B.* 290 *Cavanagh v. Sach* 3 V.L.R. L 259 *and s.* 82 *of the Justices of the Peace Act No.* 953 were referred to.

WILLIAMS, J., in delivering the judgment of the Court said—In this case the justices refused to entertain this case on the ground that they had no jurisdiction. We think that they were right. There was here a set-off which exceeded their jurisdiction and the set-off was a *bona fidê* one admitted by the plaintiff himself. Now section 82 of the Act, provides that if the set-off exceeds the jurisdiction of the justices no order shall be made. If the Court of Petty Sessions had followed this section they would have been right but they made an order dismissing the case with costs. In this they were wrong. They ought to have refused to hear it and struck it out. Whether they could have given costs it is unnecessary for us to consider. Speaking for myself I do not think they could, because by Act No. 953 it must be embodied in the order. The order made by them was wrong. Rule absolute, order of justices quashed, with costs.

(Before Higinbotham, C.J., Williams, and a'Beckett, J.J.)

MAIN v. HASKIN.

Rules of the Supreme Court, 1884. *Order LVIII rule* 15. *Order setting aside irregular judgment and order decreeing restitution of lands taken in execution under that judgment. Final or interlocutory proceedings.*

Appeal from two orders in Chambers. The plaintiff brought an action against the defendant to establish his title to certain lands and in default of appearance entered judgment as in ejectment for possession and executed a writ of possession. On the 15th of April 1889 *Holroyd, J.*, made an order in Chambers setting aside the judgment as irregular and on the 2nd of May *Hodges, J.*, made a subsequent order decreeing restitution of the lands to the defendant. From both these orders the plaintiff appealed and served notice of motion of appeal on the 29th of May.

Barrett for appellant.

Isaacs for respondent.

Isaacs takes the preliminary objection that the appeal is out of time. Both orders are interlocutory and the notice of motion should have been served within 14 days from the date of each order (Order LVIII rule 15.) The appeal against the first order is clearly

out of time even if that order was final. He cited *In re Stockton Iron Furnace Co.*, 10 Ch. D 349 *Standard Discount Co., v. La Grange* 3 C P D 67 *Crooks v. Ormerod* 3 W W and A'B L 132 and *In re Compton* 27 Ch D 392.

Barrett in reply. The order of *Hodges J.* is final as it directs an absolute restitution of the property described in the order.

Per Curiam. We think both orders, the order of *Holroyd J.*, of the 15th of April and the order of *Hodges J.*, of the 2nd of May are interlocutory and must be appealed from under Order 58 Rule 15 within fourteen days. The first order is clearly interlocutory as it is merely to set aside an irregular order and the second is founded on the first being an order to set the parties in the same position they were in before the irregular order was made. Both orders are therefore interlocutory and the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitor for appellant *Scott.*

Solicitors for respondent *Crisp, Lewis, and Hedderwick.*

HITCHINS v. THE MAYOR ETC., OF PORT MELBOURNE.

Rules of the Supreme Court 1884. *Order LVIII Rule* 15. *Application for Security for Costs of Appeal under Special Circumstances—Poverty of Appellant admitted—Important point of law to be decided—Application refused.*

Application on behalf of the defendants that the plaintiff appellant be ordered to give security for costs of the appeal. There was an affidavit filed in support of the application as to the poverty of the appellant and this was unanswered. There was admittedly an important question of law to be decided.

Hood in support. The affidavit as to the poverty of the appellant is unanswered. Mere poverty of the appellant is a special circumstance within the meaning of Order LVIII rule 15. The general rule is followed in *Swain v. Follows* 18 Q B D 587 that poverty is no bar to an action but there is an exception in the case of appeals.

Goldsmith to oppose. There is a special point of law involved and it is of public importance that it should be decided and that being so the Court will not order security for costs *Farrer v. Lacy* 28 Ch D 482.

[*Williams, J.*, referred to *Rourke v. White Moss Colliery Co.*, 1 C P D 556.]

Per Curiam. We will follow the words in the decision of *Rourke v. White Moss Colliery Co.*, and will allow the appeal to be heard without calling on the plaintiff to give security for costs.

Application refused.

Solicitors for appellant *Watson.*

Solicitors for respondent *Emerson and Barrow.*

FORSYTH v. BURNS.

Rules of the Supreme Court 1884 *Order LVIII Rule* 15. *Application for security for Costs of Appeal under Special Circumstances. Appeal in list for trial—Delay in making application.*

Application by plaintiff for security for costs of appeal.

The affidavit in support of the application showed that the plaintiff had obtained judgment against the defendant on the 7th June 1889 that notice of appeal was served on the 14th of June that the plaintiff's costs were taxed on the 24th. June, and a writ of *fi fa* was given to the sheriff on the 10th. of July, 1889. Application for security for costs was made to the defendant on the 9th of July, 1889, when it appeared that the plaintiff for the first time had any intimation of the defendant's poverty, and notice of motion to compel the defendant to give security for costs was served on the 13th. and came on for hearing of the 15th, the appeal being in the list for trial the same day. The hearing of the motion was adjourned till the 20th of July, and meantime the sheriff made a return of *nulla bona* to the writ of *fi fa.*

Box in support.

Bryant to oppose. The application is made too late; it should be made promptly and before the appellant incurs costs in preparing the appeal. *Grant v. Banque Egyptienne* 2 C.P.D. 430. All the appellant's costs were incurred before the 13th. of July, when the notice of motion was given. He cited also *in re Clough* 35 Ch. D. 7, per *Cotton*, L.J.; *Ellis v. Stewart*, 35 Ch. D. 459; *In re Indian Kingston and Sandhurst Mail Co.* 22 Ch. D. 83. [Williams, J: May there not be circumstances to excuse the delay in making the application so as to make not too late that which would otherwise be too late?]

Per Curiam. We think that in this case there are several circumstances why security for costs of the appeal should be given.

Security for costs to the amount of £25 ordered to be given within 7 days—costs of motion to abide the event of appeal.

Solicitors for appellant, *Davies & Campbell;* Solicitor for respondent, *Hughes.*

IN CHAMBERS.

(Before a'Beckett, J.)

MOUBRAY AND ORS. v. RIORDAN.

5th and 9th July.

Rules of Supreme Court, 1884, *Order IX r.* 2. *Judicature Act*, 1883, (No. 761) *Section* 59—*Substituted Service—Defendant resident out of the Jurisdiction—Order IX r.* 2 *does not apply to an*

action commenced against a person resident out of the jurisdiction.

Application on behalf of the plaintiffs for an order for substituted service of the writ in the action.
It appeared from the affidavit filed in support of the application that the defendant was resident in South Australia and it was suggested that he was attempting to avoid service.

Mr. Anderson in support.

His Honor in giving judgment on a subsequent day said:—I thought I had a matter of this kind under consideration before and I find it was in the case *Flower v. Foy* 10 A.L.T. 109. That was an application for substituted service and it appeared that the defendant was out of the jurisdiction and that he had absconded or disappeared under circumstances which showed that he had no intention to pay his debt. I made the order there, but in that case the ordinary place of residence of the defendant was within the jurisdiction and the writ was an ordinary writ for service within the jurisdiction and I thought that the jurisdiction to direct substituted service continued although the person sought to be served was at the time of the application out of the jurisdiction and I considered there (and am still of the same opinion) that the Order and Rule is not one which applies to the case of a writ for service out of the jurisdiction. It is a very strong measure to obtain an order to serve a person out of the jurisdiction altogether and then to get an order for substituted service so that the person is made amenable to the jurisdiction when he is not within the jurisdiction. As I decided in *Flower v. Foy* I think section 59 of *The Judicature Act* 1883, applies; that section is as follows [His Honor read the section]. That section seems to me to indicate what would have to be done in circumstances like the present; bnt at all events I think that Order IX r: 2, under which the present application is made, does not apply and I refuse the application.

Solicitors for the plaintiff *Kidston & Son.*

(Before a'Beckett, J.)

HAY v. PATERSON AND ANOR.

25th and 29th July.

Rules of Supreme Court 1884, *Order XXVIII r.* 1 *Amendment of Statement of Claim—Misrepresentations—Interrogatories—Costs. Where in an action for damages on the ground of misrepresentation the plaintiff, after the pleadings were closed, discovered by means of interrogatories, another ground of misrepresentation he was allowed to amend his statement of claim at his own cost by adding such misrepresentation.*

Application on behalf of the plaintiff for leave to amend the statement of claim by adding another ground of misrepresentation in addition to those previously raised.

The action was commenced by the plaintiff against the defendants Paterson and Greenlaw to recover damages for his having been induced by alleged misrepresentaions to join a company to purchase land at Fern-tree Gully.

Mr. Higgins in support.

Mr. Weigall and *Mr. Hood* for the respective defendants to oppose, cited *Clark v. Wray* 31 Ch. D. 68, and *Blackmore v. Edwards* W.N. 1879 pg. 175.

His Honor said I will consider the matter.

His Honor on a subsequent day delivered the following written judgment:—The defendants delivered their defence in this action on the 16th of May, the pleadings have been closed, and cause is set down for trial. On the 23rd of June the plaintiff delivered interrogatories. In consequence of discovery obtained by answer to these interrogatories the plaintiff now applies for leave to amend. The amendment is in no way necessitated by the defence and his original case would be complete without amendment. It was based on certain alleged misrepresentations. He now seeks at this late stage to add another misrepresentation to those on which he brought his action. I think that under the circumstances even if successful in the action he should not be permitted to ncrease costs by this protracted and piecemeal method of stating his case. As the discovery of the new matter is recent he should not be excluded from making use of it, but he should pay the costs. Order that plaintiff be at liberty to amend as mentioned in summons at his own cost and that he also pay to the defendants all costs occasioned by the amendment and L3 3s for the costs of each ot the defendants of the summons to amend. Certify for Counsel.

Solicitors for plaintiff, *Tuthill, Geoghegan & Perry*; for defendant Paterson ; for defendant Greenlaw

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(Before a'Beckett J.)

CRUICKSHANK & OTHERS v. TASMANIAN S.N. COY.

23rd. and 29th. July.

Stay of proceedings—Where an action was commenced in the Admiralty Court by A against B for damages arising out of a collision between two ships, and subsequently B commenced an action against A in the Supreme Court arising out of the same matter the action in the Supreme Court was stayed pending the decision of the action in the Admiralty Court.

Application on behalf of the defendants for an order that this action be stayed pending the decision in the Admiralty Court of an action brought by the present defendants against the present plaintiffs.

Dr. Madden in support. The application is made to the general jurisdiction of the Court. The present action and the action in the Admiralty Court involve the same question, viz: a question of liability for damage arising out of a collision between two vessels

belonging to the present plaintiff and defendant respectively. The action in the Admiralty Court was commenced first and therefore should proceed. The plaintiffs would not be prejudiced for they could raise their cause of action in the present case as a counterclaim in the admiralty action.

Mr. Hood to oppose. The application is to stay an action in this Court because the defendants have commenced an action in another Court. The defendants can stop their action in the other Court if they do not wish two actions to go on. Your Honor has no power to order in the other Court that a counterclaim should be endorsed on the appearance. The plaintiffs wish the action tried in the ordinary way and the defendants wish the action tried before assessors, but they can have assessors in the present action. The defendants give no reason for going to the Admiralty Court.

His Honor : I have some doubt as to the jurisdiction. I have no control over the other Court.

Dr. Madden in reply. In one sense your Honor has no control over the other Court, but your Honor has control over the action in this Court. An order can be made staying this action until the other action has been disposed of. The costs also would be considerably less in the Admiralty jurisdiction than in this jurisdiction.

His Honor said : I will consider the matter.

His Honor, on a subsequent day, delivered the following written judgment :—The plaintiffs in this action are defendants in an action in the Admiralty Court in which the Tasmanian Steam Navigation Company is plaintiff. The Company's Admiralty action was begun before the action at law and the Company now seeks to stay proceedings in the action in this Court on the ground that the same subject of dispute is in question in both actions—a collision between two ships belonging to plaintiff and defendant in respect of which each seeks damages from the other. This is not disputed, but in opposition to the application it is urged that the plaintiffs in this action have a right to choose their own tribunal and ought not to be compelled to litigate in the Admiralty Court. It appears that what they seek in the Supreme Court could be given them on a counterclaim in the Admiralty Court. I have no jurisdiction to compel them to resort to the Admiralty Court, but I have jurisdiction to stay their action. Having regard to the subject of both proceedings being the same, double sets of costs, and a possible difference in the decisions arrived at by the two courts should be avoided. I think the Company who make the first choice of jurisdiction in Admiralty may reasonably ask that the litigation between the parties should be brought to an end there before the matter is taken in another Court. The decision in one proceeding would be conclusive in the other, and the plaintiffs in this action can if they choose enforce their claims in the Admiralty action. This Court can give leave to proceed if the Company delay or obstruct these plaintiffs in the Admiralty action. Order that proceedings in the action be stayed until after judgment in the Admiralty action or further order. Costs of summons to be costs in this action. Certify for counsel

Solicitors :—For plaintiffs, *Gillott, Croker Snowden & Co ;* for defendants, *Malleson, England & Stewart.*

IN CHAMBERS.

Hay v. Paterson, In re the Colonial Bank.

17th and 25th July.

Bankers' Books Evidence Act 1878 *(No. 620 Sec 8—On an application under Sec 8 of Act No. 620 a bank, not a party to the action, was ordered to produce on subpœna their account books which contained entries necessary for the trial of the action.*

Application on behalf of the plaintiff under sec. 8 of The Bankers' Book Evidence Statute calling upon the Colonial Bank to produce at the hearing of the action their ledger and other account books containing entries in connection with or relating to the defendant's Paterson's and Greenlaw's respective accounts.

Mr Higgins in support. The court has power under sec. 8 to make a special order that the ledgers and day books of a bank shall be produced at the trial. The legislature has reserved this power to the Court while taking away the ordinary right to issue a Subpœna against a Bank.

Mr Moule for the Bank. The Court has no jurisdiction to make this order. The power of summoning the Bank to produce documents at the trial are expressly taken away by this Act *Arnott v. Hayes* 36 Ch. D. 731. This Act which is a copy of the English Act, 39 and 40 Vict. c. 48 was found to be wholly impracticable and fresh legislation was necessary in order to meet a case like present and a new Act was accordingly passed, this last Act has not been incorporated in Victoria. None of the sections in our Act applies to cases where the Bank is not a party and sec. 8 only gives power to order the production of the books in cases where under the preceding sections verified copies might have been put in. *Davis v. White* 50 L.T. 327. The order in its its present form is too wide and should not be granted *Arnott v Hayes supra.* The order was also resisted on the ground of privilege.

His Honor said I will consider the matter.

His Honor on a subsequent day said. The Act was intended to facilitate the proof of Bankers Books and was not intended to preserve or exclude from evidence those documents which would otherwise be available to litigants. I think that the section, which provides for a special order being made, enables me to give such rights to the litigant as he would have possessed if the Act had not passed and I think I ought to make an order going to that extent only to put the plaintiff in the same position as if that Act had not been passed and as to the question of privilege I think there is no privilege extending to the production of accounts in reference to the transaction of

the litigant for the purpose of that litigation, but I do not know that I need decide the question of privilege finally in this application I intend to leave the witness, if there be any such privilege, to raise that point in the action. I do not think it affords any reason for not making the order. My impression is against the existence of the privilege. I propose to make an order that the Bank do upon Subpœna produce the ledgers which are necessary for the action. The summons is very broad and if allowed in its entirety would go back to a period anticedent to the litigation. It should be limited to the beginning of the year 1888. As to the plaintiff's costs they should be costs in the action. No costs to the Bank certify for counsel.

Solicitors for plaintiff, *Tuthill, Geoghegan & Perry*; for Colonial Bank, *Moule & Seddon.*

Before a'Beckett, J.

LEVERSHA v. WRANGHAM.

18th July.

Venue—Change of venue—A change of venue from the country to Melbourne will not be granted on the ground merely that the sending of counsel from Melbourne would cause additional expense.

Application on behalf of the defendant for change of venue.

The action was for damages for a breach of promise of marriage.

Mr Isaacs in support. It would be very expensive and more inconvenient if the action were tried at Sandhurst rather than at Melbourne.

HIS HONOR. I thought a venue was only to be changed where it was shown that unless changed a manifest injustice would be done.

Mr. Isaacs. It is a question of preponderance of convenience *Church v. Barnett* LR. 6 C.P. 116 that was the rule before the Judicature Act and there has been no decision or rule which alters the principle of that decision. A judge has the same discretion now as he had before. *Annual Practice*, p. 484.

Mr Cussen to oppose. The rule now is that the plaintiff has an absolute right to fix the venue and unless great injustice and manifest preponderance of convenience prevails the venue should not be changed the mere question of counsel's fees has nothing to do with a change of venue.

HIS HONOR said. I will consider the matter.

HIS HONOR on a subsequent day said, application was made to change the venue in this case on the ground that the balance of convenience was in favor of such change. It is quite clear from the affidavits that the change to Benalla would be no advantage in the way of saving expense and very little in the way of convenience. It appears that the convenience of the plaintiff who brought his action in the place where he might naturally bring it would be more consulted as to the expense of his witnesses by having it tried at Sandhurst. Then it appears that the defendant's witnesses could more conveniently attend in Melbourne but that is a matter of expense only and it is sufficiently disposed of by a statement made in one of the plaintiff's affidavits which as a matter of experience I concur in viz., that no litigant can tell upon what day a case in the list in Melbourne may be called on and that therefore witnesses from the country might have to be kept in Melbourne for several days. The date of trial could be fixed for a certainty in Sandhurst but not in Melbourne. Then it is suggested that the expense of sending counsel from Melbourne to Sandhurst would be an additional expense; that may very likely be so but speaking for myself I should certainly refuse to change the venue where it is otherwise appropriate merely upon the ground that counsel's expenses would be greater in the country than in Melbourne. If that were so there would scarcely be a case tried in the country. I think upon the whole that the balance of convenience is in favor of adhering to the venue chosen by the plaintiff. I refuse the application. Costs to be costs in the cause.

Solicitors for plaintiff, *Crabbe, Cohen*, and *Kirby*: for defendant *Brown* and *Ellison.*

(Before Holroyd J.)

12th August.

DOUGHERTY v. DOUGHERTY.

Rules of Supreme Court 1884 *Order XXVIII r. 11—Order LXV r.* 27 (16)—*Certificate for counsel—Order made to amend an order after it had been made by the Judge by adding a certificate for counsel.*

Application on behalf of the plaintiff for leave to amend an order previously made by adding a certificate for counsel. An action was commenced by an originating summons for the administration of an intestate's estate by the direction of the court. Accounts were taken before the chief clerk who made his certificates, and, on the matter coming before Mr. Justice Holroyd in Chambers for a final order, His Honor made an order directing the payment of moneys and other acts to be done but did not certify for counsel. The taxing officer acting under Order LXV. r. 27 (16) refused to allow the costs of attendance by counsel on the originating summons without a certificate; this application was therefore made to amend the final order by adding a certificate for counsel thereto.

Mr. Neighbour in support. This leaving out a certificate for counsel was an accidental slip or omission which may be corrected at any time under Order XXVIII. r. 11.

HIS HONOR. An accidental slip or omission must mean something which was intended to be in the order but in this case I was never asked to certify. I should be very glad to amend the order but the question is, have I power?

Mr. Neighbour. If Your Honor does not think there is power to amend the old order there is jurisdiction to make a supplemental order. *Mayor v. Donald* 8 A.L.T. 55; *Eckersley v. Eckersley* W.N. (84) 133.

Mr. Isaacs, for the defendant. I do not oppose the application if there is jurisdiction. He cited *Huxley v. West London Extension Railway Coy.* 14 Ap. Cas. 26.

His Honor. The case of *In re Chapman* 10 Q.B.D. 54 settles the matter. There, on the taxation of solicitor's bill of costs delivered by him to his client, the master disallowed the fee and costs in respect of the attendance of counsel at Judge's Chambers for which the Judge had not certified, he not having been asked to do so, it appearing that the client had expressly authorised the solicitor to engage the attendance of counsel. The Queen's Bench Division refused to review the taxation and the solicitor appealed to the Court of Appeal which affirmed the decision of the Queen's Bench Division but *Coleridge C.J.* in his judgment at pg. 57 says: "I am very anxious however not to do injustice to this particular appellant who, being under the impression that this 14th rule did not apply to such a case as the present, did not ask the learned Judge at Chambers to certify and call his attention to the fact that counsel was instructed at the express request of the client. Under these circumstances, therefore, whilst this appeal, ought to be dismissed with costs, it is only just, I think, that it should be without prejudice to the appellant's making an application to the Judge at Chambers to certify that it was a proper case for counsel if he should think fit to do so." As this is a direct authority for the granting of the present application I will make the order as asked. I shall certify now that the case was a proper one to be attended by counsel.

Solicitors, for plaintiff, *Walduck*; for defendant, *Smith, Terry and James.*

PRACTICE COURT.

Before a' Beckett, J.

Re Charles Taylor.

6th August.

Marine Board Act 1887 (*No.* 965) *Sec.* 136 (2)—*Cancellation and suspension of certificates—Act No. 965 creates a Marine Board which puts the Court of Marine Inquiry into motion—The Court and not the Board has power to cancel or suspend certificates, but the Court cannot act unless directed by the Board.*

Rule *nisi* for a prohibition to restrain the Court of Marine Inquiry from enforcing an order made by it suspending the master's certificate of Charles Taylor, master of the steam tug Hercules for two years, for having been guilty of careless navigation whilst in charge of the said tug, on the grounds that the said Court had no jurisdiction to make the order, and that the order as made was bad on its face.

Mr. Box moved the rule absolute.

Mr. Hood and Mr. Woinarski showed cause on behalf of the Marine Board.

His Honor delivered the following written judgment.

The steam-tug Hercules struck on a reef in Port Phillip Bay when in charge of Chas. Taylor, holding a master's certificate. The Court of Marine Inquiry, after investigation, suspended his certificate for two years, and ordered him to pay 15 guineas costs. An order *nisi* has been obtained to prohibit the enforcement of this order, on the ground that it was made without jurisdiction, and was bad on the face of it. The Court of Marine Inquiry is constituted by Act No. 965, and the suspension of the certificate has been justified as an exercise of the authority expressly conferred by the latter part of sub-section 2 of section 136, not of any authority derived from the reference to the English acts made in the earlier part of the same section. Act No. 965 creates a marine board, which puts the court of inquiry into motion. The Court, not the board, has power to cancel or suspend certificates, but the Court cannot act unless directed by the board. Captain Taylor contends that the board has not given the direction necessary to give jurisdiction to suspend his certificate. The act contains provisions for inquiries into casualties and for inquiries into charges of incompetence or misconduct, which are treated as distinct subjects of inquiry, so that although an inquiry into a casualty may disclose misconduct or incompetence, an authority to inquire into a casualty is not an authority to inquire into misconduct or incompetency. Under section 136 subsection 1, the Court is authorised "to hold formal investigations into casualties," and under subsection 2, "to hold formal investigations for the purpose of making inquiry into charges of incompetency or misconduct, and when any such investigation is directed by the board to determine that any certificate shall be cancelled or suspended." The order sought to be prohibited can only be supported if there has been such a direction by the board to the Court as to give the Court power under subsection 2. The board consists of 12 persons, some nominated, some elected. Under section 25, its powers are to be exercised at meetings at which a quorum of six must be present. It is incorporated and has a seal under section 39, subsection 7. It may direct the Court to hold formal investigations into the causes of casualties, and into charges of incompetency or misconduct on the part of masters or mates. Section 129 provides that:—

"If it appears to the board that a formal investigation into any casualty, incompetency, or misconduct is expedient, the board shall refer the matter of such casualty to the court; or prefer, or cause, or permit to be preferred, a charge of incompetency or misconduct before the Court, who shall thereupon hold a formal investigation."

The inquiry conducted in this case was made in consequence of a letter from Captain Taylor reporting the accident to his vessel, and the investigation which the board directed in the first instance was undoubtedly

into the circumstances of this casualty, and not into any charge of misconduct on the part of Captain Taylor. In the course of this inquiry, to which Captain Taylor was summoned as a witness only, an incident occurred described as follows in the affidavit of Captain Taylor :—

"During such investigation, and after the said John Edgar and I were examined as witnesses, the said counsel for the said Marine Board read to the said Court, and then handed me a copy of a document in the words and figures following (that is to say) :—The Marine Board desire the opinion of the Court upon the following questions :—1. Was the rock upon which the Hercules struck on the 30th March last properly and sufficiently notified upon official charts? 3. Was the Hercules navigated with proper and seamanlike care? 6. Was a safe and proper course steered on the 30th of March last? In the opinion of the Marine Board the certificate of the master should be dealt with. Dated this 14th May, 1889."

It appears by the affidavit of the secretary of the board that after counsel had read this document to the Court the president told Captain Taylor that it was competent for him to give evidence on his own behalf, and that he would have an opportunity of showing cause why his certificate should not be dealt with. The case was adjourned, and further evidence was taken. On the 17th of May judgment was given. It is headed, "In the matter of a formal investigation held the circumstances attending the T. S. Hercules striking on a rock in Port Phillip Bay on the 30th March, 1889." It concludes as follow :—

"The Court considers that Charles Taylor, the master of the Hercules, was guilty of careless navigation in not steering a course more to the southward, so as to give the beacon a much wider berth than he did; and bearing in mind the fact that he had a great many passengers on board, which should have made him doubly careful, therefore suspends his certificate as master for two years, and also adjudges him to pay the sum of 15 guineas costs."

It thus appears that an inquiry which began as an investigation into a casualty was changed to an investigation into a charge of misconduct, and upon this charge a sentence was pronounced which the Court had no power to deliver if the board had not directed the charge of misconduct to be investigated. It is clear that the board gave no such direction at the outset, and in argument before me counsel supporting the decision were driven to rely upon the document read in the course of the inquiry as giving the necessary direction. They referred to the rules of the Governor in Council for the conduct of inquiries which were promulgated under section 135 of the act and in particular to rules 15 and 16, which run thus :—

"15. The witnesses shall be cross-examined by the parties in such order as the President of the Court may direct, and may be re-examined by the representative of the Marine Board. 16. On the completion of their examination the representative of the Marine Board shall state in open Court upon what questions in reference to the causes of the casualty, incompetency, or misconduct within the meaning of the Marine Board Act 1887, and the conduct of any persons connected therewith the opinion of the Court is desired, and if any person whose conduct is in question is a certificated officer shall also state in open Court whether it is desired that his certificate should be dealt with."

By rule 6 the Marine Board and any certificated officer upon whom a notice of investigation has been served shall be deemed to be parties to the proceeding. I think that notwithstanding these rules, and taking counsel for the Board to be the representative of the Board within the meaning of rule 16, the document which he read cannot be treated as a direction by the Board to the Court to hold an investigation into the alleged incompetency or misconduct of Captain Taylor within the meaning of section 136 so as to give jurisdiction to cancel or suspend his certificate. It must be borne in mind that the Board had in the exercise of its discretion ordered an inquiry into the casualty only, and had ordered no inquiry into misconduct. Counsel who appeared for the Board represented the Board merely for the purpose of the inquiry which the Board had ordered. It is clear from the affidavits on both sides that the Board did not in the exercise of any discretion of its own direct a charge against Captain Taylor to be investigated. If rule 16 is to be construed as vesting in counsel or solicitor attending for the Board in one proceeding authority to exercise discretion for the Board by directing another proceeding, the rule would be *ultra vires*, but I think it should not be so construed. The rule may refer to a case in which the Board has, in the first instance, directed an investigation into incompetence or misconduct. The rules, of which it is one, are taken from English rules dealing with a different state of things, where the Board of Trade, not the body making the inquiry, has power to cancel or suspend the certificate upon the report of the inquiring body. With us the Court, not the Board, has the power to cancel or suspend; but it cannot exercise the power unless the Board directs it to inquire into incompetency or misconduct. No such direction has been given by the Board in the present case, and on this ground the rule for prohibition will be made absolute. It has been suggested that the order of the Court of Inquiry may be good as to costs, though bad as to the suspension of the certificate; but I cannot accept this view. The order as to costs was incidental to the exercise of jurisdiction wrongly assumed. The power as to costs, conferred in general terms, was not intended to be used, and could not properly have been used, as against a mere witness on an inquiry into a casualty. The order has been assailed upon another ground, as bad on the face of it, as it does not show that the Board has found as a fact that Captain Taylor has committed any one of the specified delinquencies, one of which he must commit to make him amenable to punishment. The Court finds him guilty of careless navigation, but the Act does not make careless navigation a punishment. Under section 4 of the Act, "misconduct" includes careless navigation, and under section 136 "gross misconduct" justifies the cancellation of a certificate. The word "gross" must be taken to be advisedly used in our own act and in the English act, from which our own is taken. The Court of Marine Inquiry has not stated that it found Captain Taylor guilty of gross misconduct and unless it determined that he was so guilty it had no power to punish him. This Court cannot say whether or not his misconduct should be characterised as gross. It was necessary to the validity of the sentence that it should show that the Court found an offence to have

been committed which justified a sentence. This does not appear—and on this ground also I think the order should be made absolute. The Court of Marine Inquiry has been misled by the rules to which reference has been made, and may in fact have adjudged that Captain Taylor was guilty of gross misconduct, though it has not said so. For these reasons I make the rule absolute without costs.

SITTINGS IN BANCO.

(Before Higinbotham, C.J., Williams and àBeckett, J.J.)

BRUCE v. STURT.

19th July.

Vendor and Purchaser—Conditions of Sale—Compensation Clause—Misdescription or defect in title?

Appeal from the County Court Melbourne.

This was an action on an award. The defendant sold the plaintiff certain lands in Toorak of a certain length and certain breadth which corresponded with lands delineated in a colored plan on the back of the contract of sale. By the requisitions on title it was discovered that the defendant could not make title to some ten feet of the land in question; there was a compensation clause in the condition of sale (clause 10) which provided that if any mistake should be made in the description of the premises or any other error whatsoever should appear in the particulars of the property compensation, the amount to be fixed by arbitration should be given to the purchaser. The plaintiff relying on this condition accepted title and took a conveyance of the lands sold and, on the defendant refusing to submit to arbitration, appointed under the terms of the condition an arbitrator who awarded him a certain sum as compensation for the deficiency. The plaintiff brought an action against the defendant to enforce this award. The Judge held that there was a misdescription of the premises within the meaning of the compensation clause and gave a verdict for the plaintiff for the amount claimed with costs and the arbitrators' expenses.

Mr. Higgins for the appellant. The arbitrator had no jurisdiction. The compensation clause only applies where there is a mistake in the description of the property, here the particulars and plan accurately describe the lands sold; afterwards it turns out the vendor cannot make title to some 10 feet; this is no misdescription: it is a mere defect in title. *Mawson v. Fletcher* LR 10 Eq. 212 affirmed in appeal 6 Ch 91. The purchaser having accepted title and taken a conveyance of the lands sold cannot now claim compensation for defect in title. *O'Shanassy v. Littlewood* 10 V.L.R(L)117 relied on in the Court below isdistinguishable, there the property sold was known as the Lower Moira Station but the acreage in the particulars did not correspond with the real area; that was a case of misdescription.

Mr. Weigall for respondent. The purchaser is entitled to get from vendor under a contract of sale as much as the vendor can give with compensation for what the vendor cannot give or make title to. The contract with the colored plan amounts to a sale with a marketable title of the lands delineated on the plan; this plan or picture does not correctly represent the lands the vendor has title to. The purchaser does not waive his right to compensation by accepting title and taking a conveyance of the whole property. Objections to title mean objections going to the root of the title. Where they go merely to the title to part of the lands the compensation clause applies. *Mawson v. Fletcher* merely decides the right of the vendor on an objection to title to part of the lands sold to rescind under the conditions of sale, *O'Shanassy v. Littlewood* is in point and governs this case.

THE CHIEF JUSTICE—In this case the judgment must be for the defendant. The appeal is from a judgment of the County Court in an action to recover a sum of L200 on an award by an arbitrator. The substantial defence, and the only one necessary to deal with, is whether the matters with which the arbitrator dealt were matters with which he was competent to deal, or whether he had no jurisdiction over them. The reference on which the arbitrator acted is contained in the 10th clause of the conditions of the contract of sale, which provides that "if any mistake be made in the description of the premises, or any other error whatsoever shall appear in the particulars of the property, such mistake or error shall not annul the sale, but compensation or equivalent shall be given or taken as the case may require, such compensation or equivalent to be settled by two referees mutually appointed, or their umpire. The party discovering such mistake or error to give notice in writing thereof to the other party within seven days after such discovery, and each party within seven days after such notice shall appoint in writing a referee, and, if in such case either party shall neglect or refuse to appoint a referee within the term above specified, the referee of the other party alone may proceed in the matter," &c. Interpreting that clause strictly as against the vendor, we think that it has not been established that there has been any mistake or error made in the description of the premises, or any other error made applicable to the description of the property. The description of the premises and the particulars of the property appear to be one and the same thing. They appear by the description of the property set forth in the introduction before the first condition of sale, and also on the plan referred to in it, represented by lines and bounds. These contain a description of the land intended to be sold by the vendor and to be bought by purchaser. The description of the premises gives a lineal frontage of 111ft. 6in. to Canterbury Street, and a frontage of 81ft. 5in. to Ross Street, the western boundary of the land, as delineated and colored red on the plan at the back of it. The plan also contains the same description of it. There appears to be no error or mistake in the description of the premises,

either in the introduction or in the plan. The plaintiff sues for compensation for error or mistake, and the question is whether the defect of title to a portion of the land, as set forth in the description and plan, is such error or mistake as entitles the purchaser to claim compensation under clause 10. The conduct of the parties seems to have been singular, and they seem to have anticipated this difficulty from the outset. The purchaser started with making requisitions on and objections to the title. At the same time it was plain that he intended his objections and requisitions to be objections and requisitions to the title only. It was plain that he desired to complete the contract to obtain the land as described, at the same time to prevent the vendor from exercising the right he possessed under the fourth condition to rescind the sale. That fourth condition was: In case the purchaser shall, within the time aforesaid, make any objection to or requisition on the title which the vendor shall be unable or unwilling to remove, which right of election the vendor absolutely reserves to herself," the vendor might annul the sale and return the purchase money. There is nothing to show that the vendor was acquainted with the defect in the title as to 10ft., till that fact was communicated to her by the purchaser in the requisitions sent in. By the requisitions the purchaser, for the first time, communicated to the vendor the knowledge that she had, by a memorial of conveyance dated the 21st. April, 1871, conveyed away 10ft. of the frontage to Canterbury Street. The position taken by the vendor was a fair one, and she told the purchaser that he could take the same quantity of land on the south side. The purchaser, for some reason not apparent, did not desire to consent to this; probably he wished to get the land and also compensation for the 10ft. The purchaser did not depart from that position. In the correspondence he insisted that the 10ft. should be matter of compensation. The vendor reasonably enough asked if he insisted on the objection to the title. To that reasonable demand the purchaser made no answer, but accepted the property, paid the purchase money, and took the conveyance. That was put as an abandonment of the requisition on the title. It is not necessary to decide that, as the purchaser in taking the title took the risk of making good his claim for compensation. The general rights of purchasers and vendors may be limited and defined by a special agreement between the parties. In this case the vendor and the purchaser had limited the compensation to a particular case of mistake in the description of the premises, or some other error appearing in the particulars of the property, and that did not apply to the circumstances of this case. Although the defect in the title to a portion of the land had been discovered, and might have been established and proved, and have given rights to the two parties, it had not been shown that there was any mistake in the description of the property, or any error in the particulars. The plaintiff failed in the court below to establish a necessary part of his proof that the claim for compensation, or the subject matter which the arbitrator was dealing with, was within his jurisdiction. The judge was therefore wrong in giving judgment for the plaintiff. It is unnecessary to refer to other points in the case, except to say that the judge had no power to award a portion of the expenses of the arbitrator. The appeal will be allowed with costs and the judgment set aside.

WILLIAMS, J.—Having regard to the course taken by the purchaser, he is not entitled to claim compensation. He was asked by the vendor whether he objected to the title or accepted it. He deliberately accepted the title to prevent the vendor exercising what would otherwise have been her undoubted right under clause 4 to annul the sale. He took a conveyance of all the land the vendor contracted to sell, and which he agreed to buy, and he paid the purchase money. He has therefore precluded himself by the course he took from claiming compensation, just as he prevented the vendor from exercising her right to rescind the contract. If he had insisted upon getting a conveyance to such portion of the land as the vendor could give a good title to, and insisted upon compensation for the balance, he might possibly have maintained his claim to compensation under clause 10.

A'BECKETT, J.—I wish also to add I am of the same opinion as my brother *Williams*. I attach most weight in this case to the conduct of the plaintiff. He has by his conduct precluded himself from the contention that he has a right to accept title as to part and claim compensation for the deficiency of 10ft. He has endeavored to exclude the vendor from the rights she had. He resorted to equivocal conduct, and did not distinctly declare what position he intended to take. He took a conveyance of the property. When a man takes a conveyance of property, including land deficient, he cannot claim compensation for a deficiency in the quantity of land he takes. This decision should not be taken as establishing any general principle of law, but as applicable to the peculiar circumstances of the present case. So far as the title of the vendor went and was shown, it exactly coincided with the description of the property.

Appeal allowed with costs. Judgment for defendant with costs.

Solicitors—For appellant, *Davies and Campbell*; for respondent, *Woolcott*.

(Before Higinbotham, C.J., Williams and àBeckett, J.J.)

BROWN v. TREYNOR.

24 July.

Licensing Act 1885 *sec.* 86—*Suffering an unlawful game to be played in licensed premises after the premises are closed—Meaning of Words* —"*Suffers or permits any person to play any unlawful game or sport in or upon his licensed premises*"—*effect of No.* 1008 *sec.* 2 *as regards offences committed under*

No. 857 *sec.* 86—*Justices of the Peace Act* 1887 *s.* 7—*No Stamp on Summons.*

Lester v. Torrens 2 *QBD* 403 *distinguished.*

Order nisi to review a decision of Justices. The facts and arguments sufficiently appear from the judgments.

Mr. Hood for the informant. *Inspector Brown* to show cause.

Dr. Madden for the defendant to move the order absolute.

The CHIEF JUSTICE. This is an order to review a conviction by a court of petty sessions, by which the licensee of licensed premises was convicted under section 86 of the *Licensing Act* No. 857, of suffering certain persons to play an unlawful game upon his licensed premises in the licensing district of Fitzroy North. The order *nisi* was obtained on four grounds. The first two grounds raised the question as to the continuing power and jurisdiction of the Bench to deal with this charge. The offence was alleged to have been committed on the 21st February, 1889. The information was laid by the prosecutor, an inspector of the licensing district, on the 7th March, and the conviction was on the 16th March. In the interval between these two last-mentioned dates, namely on the 11th March, the Legislative Assembly was dissolved. By the *Act* No. 1,008, providing for new electoral districts, all licensing districts then in existence were abrogated from and after the next dissolution of the Legislative Assembly. It was contended for the defendant on the first ground of this order that the effect of the dissolution of the Legislative Assembly was to put an end to and extinguish offences which had been committed under section 86 of the *Licensing Act* previous to that time, and also to put an end to and invalidate proceedings taken for the prosecution and punishment of the offenders. By the Act 1,008 the licensing districts then in existence were to cease to exist, except for a certain limited purpose, namely, the renewal of annual licenses. It is contended that the effect of the dissolution on the then existing licensing districts was to extinguish offences previously committed, and prosecutions which had been previously commenced. We do not concur in that contention. The *Act* 1,008 does not profess to deal with or to repeal section 86 of the *Licensing Act* or anything done under it, or to condone or wipe out any offence under the section. The alleged offence here was completed on the 21st February, the information was laid on the 7th March; the offence, if not pardoned or extinguished, continued to be an offence subject to proof. Once the information was laid the informant was liable for all costs of the proceedings which he had initiated, and he was brought within the jurisdiction of the Court, which could compel him to proceed with the information which he had laid. We think, therefore, that the first ground on which the order was based is not supported. The second ground assumes that the offence continues to exist, and that the information laid is still in force. But it is contended that the prosecutor, the inspector of the licensing district, has no longer any *locus standi* sufficient to enable him to appear and prosecute for the offence. The prosecutor was authorised by the licensing statute to appear by counsel, or by attorney, or personally. There was no necessity for the informant to appear again in the proceedings personally after he had laid the information, nor was there any necessity for him to do more than submit to the judgment of the Court. The office of the inspector was not abolished, and the appointment of the inspector was not cancelled. The prosecutor still continued to be inspector in that district, and in which he was required by law to take proceedings against licensed persons in necessary and proper cases. We think therefore, that he has a *locus standi*, and he could have been compelled by the Court to appear by counsel or attorney or in person, and continue the proceedings, which, so far as this ground is concerned, have been validly commenced, and have not been stopped by the operation of the Act, 1,008. The third ground on which the order was applied for was that the offence appeared to have been committed during the hours when the licensed premises were closed. It is contended that it was not an offence to permit a person to play an unlawful game on licensed premises, or to suffer or permit thieves, prostitutes, or disorderly persons to be upon the licensed premises during the hours in which the premises were required by law to be closed, or during Sunday, on which day the licensed premises were to be closed for the entire period of the day. That view, it is contended, was supported and affirmed by a decision on a similar section of the English act—*Lester v. Torrens* 2 Q.B.D. 403. In that case the information was laid under the 12th section of the English *Licensing Act* 1872 corresponding with the 116th Section of our Act. [His Honor read the section] It was held that a licensed person found drunk on his own licensed premises after the premises were closed was not liable to a penalty under that section. The judgment appears to have been based on the opinion that the operation of the section under which the information was laid was intended to be restricted to offences committed in a public place; one of the judges points to the use of the word "found," another refers to the heading of the clause viz., "Offences against Public Order" as indicating the intention of the Legislature and on these grounds the Court appears to have held it was not an offence to be drunk on licensed premises after the premises were closed and when they were no longer a public place. It is not necessary to consider that decision. Suffice it to say it ought not to govern us in a case like the present one which is brought under the 86th section of our *Licensing Act*. That section came under a part of the act referring to the duties and liabilities of licensed persons and others. That part of the statute contained a large number of acts which the licensed person was prohibited from doing, or was directed to do—some acts within the licensed houses, and some without them. They pointed to the conclusiou that the Legislature intended that licensed persons under this statute should have cast upon them certain personal duties and obligations in connection with the license, and

in connection with licensed houses, even though these duties and obligations should not be immediately connected with the maintenance of public order or public decency. The licensed person, for instance, was compelled to have his name painted in front of his premises, and in certain cases had to keep a lamp lighted during the night and during some of the hours when the house was closed. It was clear that sec. 86 prohibited the licensed person permitting the acts mentioned in it to be done at any time on his licensed premises, even whether they were done during the closed hours or not. The last ground was that there was no stamp affixed to the summons served on the defendant, as required by the *Justices of the Peace Act*. A sufficient answer to this objection was that no summons was required in this case and if it had been required and produced it could not be objected to on these grounds. The law expressly prohibited an objection to a summons by which the alleged offender was got to the court. He was before the Court, and even if there was no summons the Court had jurisdiction to deal with him: he was before the Court, and that was sufficient. That objection also fails, and the order to review the conviction by the justices will be discharged with costs.

WILLIAMS, J. I don't wish to express anything on the second and fourth grounds as I think they have been abundantly answered in argument but I will add a few words on third ground on which the order *nisi* was granted. The section of the English Act under which *Lester v, Torrens* was decided is distinguishable from sec. 86 of the Victorian Act and therefore the decision does not apply to this case. *Lester v. Torrens* was decided under the 12th section of the English *Licensing Act* 1872 and the *ratio decidendi* was that the words 'licensed premises" in that section are *ejusdem generis* with the words "highway or other public place" and that is what *Lush* J. means when he says "I think looking at the collocation of the words licensed premises for the purposes of the section must mean premises open to the public during licensed hours or during the time when the premises are a *quasi*-public place." These words throw a flood of light on *Lester v. Torrens* and show that "licensed premises" under that section means when the licensed premises are a public or *quasi*-public place whether a building or not. That reasoning cannot apply to the construction of sec. 86 of the Victorian Act which makes the offence an offence at any time on licensed premises and therefore *Lester* v. *Torrens* is no authority in this section but would be a good authority on the construction of sec. 116.

Order to review discharged with costs.

Solicitor for informant *Crown Solicitor.*

Solicitors for defendant *Gaunson and Wallace.*

SUPREME COURT SITTINGS.

(Before Hodges, J.)

PLEASANCE AND OTHERS v. ALLEN.

June. 12, 14.

Land Transfer Statute No. 301 sec. 49. Act No. 872, s.s. 7, 8—Rectification of title—Mutual mistake—Privity.

The plaintiffs and defendant were respectively the proprietors of two adjoining pieces of land fronting a certain street formerly in the possession of a single proprietor. Two cottages stood upon one of the pieces and an hotel upon the other. The plaintiffs and defendant did not derive direct from the original proprietor but deduced their title through a number of intermediate purchasers. The original proprietor had sold that portion of his land on which the cottages stood before he had sold the other portion. On each step of the title in either case it appeared in evidence that the object of each transaction was not the purchase of a certain number of feet of land but of the buildings respectively. It was subsequently discovered that the frontages occupied by the cottages in the one case and by the hotel in the other did not correspond with the measurements set out in the certificates of title but the frontage set out in the certificate of title to the land on which the cottages were built encroached to the extent of 5½ inches upon the boundary wall of the hotel. The plaintiffs claimed to recover possession of the 5½ inches, and the defendants counterclaimed for rectification of the title.

Held that the defendant would be entitled to have his certificate rectified by having the 5½ inches included in it so as to make it correspond with the land occupied by the hotel, provided that he could obtain for the plaintiffs a title to a corresponding portion of land at the other extremity of the frontage represented in their certificate of title.

On the question of privity, Sutherland v. Peel (1 W W *and a'B 18*) *followed.*

Action to recover possession of 5½ inches of land situate in Carlisle-street, Parish of Prahran and County of Bourke. The plaintiffs were George Pleasance, John Healy and Ernest Bolger, and the defendant was Edward Allen.

From the pleadings and evidence it appeared that one E. T. Buckeridge on or about the 2nd Feb. 1887 was the registered proprietor of certain land forming portion of Crown Allotment 217 A having a frontage to Carlisle-street of which frontage the 5½ inches formed part. On part of this land were erected 2 shops and on the remainder an hotel all fronting Carlisle-street, on the 12th Sept. 1887, Buckeridge sold to one M. L. Wiseman that part of his land on which were erected the two shops. In the contract of sale signed by both parties the land sold was described as land "upon which are erected two brick shops, etc.," when the transfer was being executed, the land stated to be transferred, was made to encroach 5½ inches on the wall of the hotel: this was done by reason of a mistake on the part of the solicitor, as was alleged by the defendant. A certificate of title, accordingly, to such land including the 5½ inches was issued to Wiseman on the 30th Nov. 1887 Wiseman sold to two persons and the land was transferred as contained in the certificate of title. These two persons subsequently sold to the plaintiffs and again the land was transferred as contained in the

certificate of title. It was contended by the defendant that none of their successive purchasers intended to purchase the land as set out in the certificate of title and that it was by mutual mistake of vendor and purchaser in each instance that the 5½ inches were included in the transfer in each case. Buckeridge sold the land on which the hotel was built to Messrs. Joske and Best, in October, 1887, who subsequently transferred the land to the defendant. In these transfers, also, it was alleged a corresponding mistake was made in excluding the 5½ inches which really was occupied by the hotel from the transfers and certificate of title. The defendant counterclaimed that the certificates of title issued respectively to the plaintiffs and defendant be rectified by excluding from the certificate of the plaintiffs the 5½ inches and by including the same in the certificate of the defendant.

It was, accordingly, contended by the plaintiffs that even assuming the defendant was entitled to have his certificate rectified, he should, in the first instance, obtain for the plaintiffs a title to a corresponding amount of land at the other extremity of the plaintiffs' frontage.

Bayles, for the plaintiff, opened the case.

Topp (*Weigall* with him)—Act No. 872 ss. 7, 8; gives power to rectify certificates of title. The certificate should be rectified in this case as the mistake is mutual. *Sutherland v. Peel* (1 W.W. and a'B. 18) is an authority as to the apparent want of privity. In the successive transfers in each case, the parties obviously intended to purchase the shops in the one case and the hotel in the other, and not the land on which they respectively stood.

Higgins, in reply, contended that the intention of the successive purchasers to purchase the buildings and not the land should be unambiguously proved; he relied on Sec. 49 of the *Transfer of Land Statute*: in any event the plaintiffs should pay the costs as they would not accept any reasonable offer.

His Honor, in giving judgment, said:—The plaintiffs in this case seek to eject the defendant from some 5½ inches of land. The plaintiffs have a perfect paper title—a certificate—and, unless the defendant can establish his right to have that document rectified, the plaintiffs are entitled to succeed. The defendant, by his counter-claim, seeks to have the plaintiff's and the defendants certificate of title rectified by excluding from the certificate of the former and including in the certificate of the latter the 5½ inches of land. The circumstances of the case can be stated in this way: About the 2nd. February 1887 one Buckeridge was the owner of the piece of land on which the plaintiffs' shops were standing and also of the piece of land on which the defendant's hotel was standing. About the 12th. September 1887 Buckeridge sold a certain portion of this land to one Wiseman, and in the contract of sale the land sold is described as the land upon which 2 shops were erected. the Transfer, as drawn up upon that contract, did not describe the land as that on which 2 shops were erected, but as land commencing at a certain distance from a certain point. It turns out, as shown by the evidence, that the land described in that contract is not identical with the land described in that transfer, and that Wiseman had had transferred to him 5½ inches of the land on which the wall of Buckeridge's hotel stood. I take it that that was done by mistake Buckeridge sold and intended to sell the land on which the two shops were erected and were nothing else and the parties at that time intended to deal with that land and with that land only, but by mistake the transfer was made to include 5½ inches of the land on which Buckeridge's hotel stood and did not include all the land on which the 2 shops stood—in other words the land described in the transfer was 5½ inches further west than the land described in the contract. Wiseman then sold to other persons. Metcher and Abbott—and again it is clear from the evidence that the parties bought what they saw upon the ground and nothing else. They bought, not a certain piece of land so many feet from another street, but what they saw on the land, which was a certain amount of frontage to a particular part of that street on which 2 shops were erected, and this is what Wiseman sold and intended to sell and in the sale from Metcher and Abbott to the plaintiffs the same mistakes were continued. And in all the above cases the mistakes were common to the buyers and sellers. I think the evidence shows that clearly as it would be a monstrous thing to think that Buckeridge was selling the wall of his hotel when selling the cottages. But, still, if the acts of the parties were such as to lead me to suppose that they bought according to title and not according what they saw on the ground, I should have been bound to give effect to that. But they bought what they saw. If Buckeridge had remained the owner of the hotel, the remedy in an action between Buckeridge and Wiseman, would have been very clear. One or the other would have taken proceedings to have the transfer rectified, and so the certificate would have been rectified; but a difficulty has arisen in this case in that Buckeridge has parted with the hotel which has gone into other hands. The defendant Wiseman has sold and conveyed to Metcher and Abbott and Metcher and Abbott have sold to the plaintiffs and it has been contended on section 49 of the *Land Transfer Statute*, that no matter what mistakes had been made, this matter cannot now be dealt with, and that the plaintiffs were bound to succeed in their action for ejectment; and it was argued, that inasmuch as the plaintiffs bought from Metcher and Abbott who had the certificate of title and were purchasers for value from the person with the certificate of title, by section 49 the land was absolutely free from all encumbrance whatsoever except as to any portion of the land that may by wrong description of parcels or boundaries be included in the grant, certificate of title, or instrument evidencing the title of such proprietor; it was, however, said this latter exception did not apply to the present case by reason of the words following and consequently that the certificate was absolutely free from

all incumbrances. This involves the question whether the plaintiffs were purchasers for valuable consideration and undoubtedly they were so, but what were the plaintiffs purchasers of for valuable consideration; it seems to me that these words in the 49th sec. mean, that they must be purchasers for valuable consideration of what is described in the certificate of title. In my opinion they are not a purchasers for valuable consideration of what is described in the certificate. There are purchasers for valuable consideration of the land on which the shops stood not of the land on which the hotel stood. They are no more purchasers of the land on which the hotel stood, than a person would be a purchaser for valuable consideration of 66ft. frontage to Collins street, Melbourne who had only contracted to purchase 66ft. frontage to Collins street, Bendigo, and to whom by mistake a transfer had been executed of 66ft. frontage to Collins street, Melbourne. The court in such a case would say at once "He is not a purchaser for valuable consideration of 66ft frontage to Collins street, Melbourne" and unless he is, this section would not prevent me going behind the certificate of title and making an order which would enable the defendant to get his land. But when the defendant asks for equity he must do equity, and to do equity he must give the plaintiffs that which they agreed to buy and he cannot take from them that which he says was given to them by mistake without getting from them that which they bought; as he asks for mistakes to be rectified in his favor, he, on his part, must rectify mistakes in the title of any person to whose prejudice the rectification in his own favor has to be made. I shall make an order allowing the action to stand over for three months; meanwhile the defendant to see if he can give the plaintiffs a title to the land on which the cottages stand; if he does this, order the plaintiffs to transfer the five and a half inches to the defendant, but, as I think, the defendant has been, accidently perhaps, the author of this litigation by starting to have the title rectified, and that offers were made to him to which he made no response except by referring to his solicitor, I must go slightly further against the defendant than Mr. Justice Molesworth in *Sutherland v. Peel* and make him pay the costs. In that case the court ordered each party to bear his own costs, but there the plaintiff had offered the defendant all that he was entitled to. If the defendant in this case had acted in the same way I should probably have made the plaintiff pay the costs, but as he did not meet the plaintiffs in any way I shall make the defendant pay the costs of the action.

The action will therefore stand over for three months to see if the defendant can give the plaintiffs a good title to the land on which the shops are built, if he gives the plaintiffs a good title to this land which is to be done at the defendant's expense, then I will order the plaintiffs to transfer to the defendant the 5½ inches in dispute. Liberty to apply.

Solicitors for the plaintiff: *Blake and Riggall*; for defendant, *Nathan.*

Before Hodges, J.

WILSON v. STEWART.

15th 16th 17th 19th July.

Lessor and Lessee—Option to Purchase—Performance of Covenants—Condition Precedent—Definition of Estoppel.

A leased to B and C for the term of seven years commencing 12th. April, 1882, certain land and premises. The lease contained (in addition to covenants by the lessees not to assign or sub-let without the consent in writing of the lessor, to keep in repair and to pay the rent in advance) the following covenant:—"And it "is hereby further covenanted and agreed by and "between the said parties hereto that if the said "lessees their executors administrators or assigns "(having duly paid the said rent and performed the "said covenants in all respects) shall at the end of "the said term of seven years hereby granted be "desirous to purchase the fee simple and inheritance "of the said premises shall during the said term of "seven years give to the said lessor his executors "administrators or assigns or leave for him or them "etc., three calendar months notice in writing expir-"ing at or before the end of the said term then the "said lessees their executors administrators or assigns "shall become the purchasers thereof upon payment of "L1400, etc." On the 4th. November, 1882, the lessees sub-let portion of the premises to a tenant; and on the 5th. December, 1883, C assigned his interest under the lease to B. A did not give any express consent to the sub-lease or assignment nor was he aware of them at the time they were effected; but he came to know of them shortly afterwards, and received the rent as usual. On the 13th. September 1888 B gave notice of his intention to exercise his option under the covenant, but A refused to perform on the ground that the covenants in the lease had not been duly performed.

Held, that a due performance of the covenants in the lease was a condition precedent to the exercise by B of the option of purchase. The mere fact of the receipt of rent subsequent to the breaches of covenant simply amounts to a waiver of the lessor's right to forfeit the lease, and not to a waiver of the lessor's right to insist upon the due performance of the covenants as a condition precedent to the exercise by B of the option of purchase.

If a man by words or conduct intentionally leads another to believe in the existence of a certain state of things and to act on that belief the former is precluded from averring a different state of things as existing at that time.

Action taken by Andrew Wilson against John Stewart for specific performance of an agreement hereinafter mentioned, or in the alternative for damages.

The facts are as follows:—By lease dated the 4th. April 1882 the defendant leased to the plaintiff and one Alfred Smith certain land and premises in King

Street Melbourne, for the term of seven years commencing the 12th. April, 1882. The lease contained, amongst others, covenants by the lessees that they should pay the rent recovered in advance, that they should not assign or sub-let without the written consent of the lessor and that they should keep the premises in repair. Then followed another covenant to the following effect:—"And it is hereby further "covenanted and agreed by and between the parties "hereto that if the lessees their executors administra- "tors or assigns (having duly paid the said rent and "performed the said covenants in all respects) "shall at the end of the said term of seven "years. . . . be desirous to purchase the "fee simple and inheritance of the said premises "shall during the said term of seven years. " . . . give to the said lessor his executors ad- "ministrators or assigns. . . . three calendar "months notice in writing expiring at or before the "end of the said term then the said lessees. . . . "shall become purchasers upon payment of the said "sum of £1,400 on or before the last day of the said "term and of all rent due to the end of the said term "etc." By a sub-lease dated the 4th. November 1882, the lessees granted to one Charles Boyle portion of the demised premises.

By deed dated the 5th December 1883, Alfred Smith one of the lessees assigned his interest in the lease to the plaintiff. By notice in writing dated the 11th September 1888 and served on the defendant on the 13th September 1888, the plaintiff gave notice of his intention to purchase the demised premises in accordance with the terms of the above quoted covenant, but in January 1889, the defendant purported to renounce his obligation under the covenant and declared to the plaintiff his intention of not performing the covenant on the ground that the plaintiff had not duly performed the other covenants of the lease. The defendant had not given his consent to the sublease or the assignment above mentioned before they were respectively made, but he had come to know of the fact of their existence almost immediately after they had been made; he had subsequently received rent as usual. On the 10th April, 1889, the plaintiff tendered the stipulated sum of £1,400 to the defendant, which the defendant refused to accept.

Dr. Madden (*Weigall with him*) opened the case for the plaintiff. It was contended that the performance of the covenants was not a condition precedent to the exercise of the option to purchase; even if it was a condition precedent the defendant had waived performance by the receipt of rent and otherwise. The defendant was estopped from setting up the breaches of covenant by his subsequent conduct.

Neighbour (*Higgins with him*) opened the case for the defendant. The words "having duly performed the said covenants," import a condition presidant; *Finch v. Underwood* (2 C.D. 310); *Bastin v. Bidwell* (18 C.D. 238); *Western v. Collins* (11 J.N.S. 190); *Lord Ranclaugh v. Melton* (2 Dr. & Sm. 278); *Woodfall's Landlord and Tenant* 345; The plaintiff has not performed the covenants, (1) by subletting, (2) by the assignment, (3) by not keeping the premises in repair, (4) by not paying the rent in advance. The waiver which is the consequence of receipt of rent subsequent to breach of covenant is simply a waiver of the right of forfeiture and nothing more. The defendant is not estopped as he has given no consent in writing to the sublease in the assignment; *Willmott v. Barber* (15 C.D. 105); he only came to know of the breaches of covenant subsequently to the breach. The defendant agreed to sell to two lessees not to one.

Dr. Madden, in reply; The expression "having duly paid the said rent &c," mean "provided the lease be in existence at the time." It does not amount to a condition precedent. *Dawson v. Dyer* (5 B & A 584); *Allen v. Babington* (Siderfin 280); *Hays v. Bickerstaffe* (2 Leach's Mod. 35); *Briant v. Pilcher* (16 C.B. 354); *Barwick v. Duchess of Edinburgh* Co. (8 V.L.R. (E) 79); the defendant had sufficient knowledge of the sublease as to enable the doctrine of waiver to apply; *Carson v. Wood* (10 V.L.R. (L) 223).

C. A. V.

His Honor,—By deed dated April the 4th 1882 Stewart the defendant leased to the plaintiff and one Smith for a term of years commencing on the 12th April 1882 certain land and premises in King-street. It was covenanted,—inter alia.—that the plaintiff and Smith should pay the rent in advance on the 12th day of every month during the term and that they should at their own costs well and sufficiently repair thelands and hereditaments thereby demised and should not assign or underlet without the consent in writing of the lessor. Then followed a covenant, on which the present action is founded, which runs as follows:— "And it is hereby further covenanted and agreed by "and between the said parties hereto that if the said "lessees their executors, administrators or assigns (hav- "ing duly paid the said rent and performed the said "covenants in all respects) shall at the end of the "said term of years hereby granted be desirous to "purchase the fee simple and inheritance of the "said premises hereby demised for the sum of £1400 "and if such the desire and intention so to purchase "shall during the said term of 7 years hereby granted "give to the said lessors his executors, administrators "and assigns or leave for him or them at his or their "last known usual place of abode in the Colony of "Victoria 3 calendar months notice in writing ex- "piring at or before the end of the said term then "and in such case the said lessees their executors, ad- "ministrators or assigns shall become the purchasers "thereof at that sum upon payment of the said "sum of £1400 on or before the last day of "the said term and of all rent due to the "end of the said term." After the lease had been entered into the plaintiff and Smith proceeded to take possession of the premises, and, as to what took place upon their taking possession there is a conflict in the evidence. And upon that conflict I find that it was then expressly agreed that the rent should not be paid in advance notwithstanding the

provision to the contrary in the lease. After possession had been taken, some time in July the plaintiff and Smith agreed with one Boyle to let to him a portion of the premises and subsequently a sub-lease was granted by them to Boyle. Boyle's name was printed on the premises shortly afterwards, and I find that the defendant came to know that fact and actually saw the name almost immediately after it was painted up. I find that the defendant really knew of the lease granted to Boyle soon after the lease had been granted. There is another disputed fact a dispute about a certain letter and about a certain answer to that letter on which I should express how I find. On that point I am against the defendant. I do not believe that such a letter ever existed. If it had, there would have appeared on the pleadings an allegation of the performance of the covenant, and no such allegation did appear. I find also that the plaintiff did not know of the lease to Boyle before it was made; he did not know of Boyle's tenancy before he was a tenant and did not give any express assent to the creation of such a tenancy; but he knew of the existence of that tenancy afterwards and received rent with the knowledge of its existence. The next fact is the dissolution of partnership in December 1883 between the plaintiff and Smith; an advertisement to that effect was published. Here again I believe that the defendant knew of the dissolution soon after it took place. I do not believe he was consulted as to the dissolution or as to the terms of it. Smith assigned his interest to the plaintiff. I do not know how far I can believe Wilson and how far the defendant in giving their evidence in relation to this assignment. I think there have been mistakes on both sides; on the whole I find that the assignment was made by Smith to the plaintiff without the knowledge of the defendant; but he came to know of it soon afterwards. I also find, as indeed is not disputed, that the proper notice was given by the plaintiff of his intention to exercise the option of purchasing the property by virtue of the covenant. On these facts the plaintiff claims specific performance of those terms in the lease which gives him an option to purchase. The defendant objects and his objections may be narrowed down to three. He says, the defendant cannot succeed because he did not duly perform the covenant in all respects, and the particulars of the breaches are three in number. 1st. That without the consent in writing of the lessor, the lessee Smith assigned his interest under the lease to the plaintiff. 2nd. The lessees underlet a portion of the premises to Boyle without the consent in writing of the lessor. 3rd. That the notice in exercise of the option was given by one lessee and ought to have been given by all. To these objections to plaintiff gave three answers. He said, 1st, that the performance of the covenants was not a condition precedent to the exercise of the option. 2nd, that having received rent with knowledge of the breaches of the covenant he (the defendant) had waived this particular clause. 3rd, that the defendant is estopped by his conduct from raising the breaches of covenant as a ground of defence. With regard to the plaintiffs first answer, I propose to consider the question first on the document itself on general principles and then upon the authorities. [His Honor here read the covenant in the lease quoted above.] Are not these words a condition precedent? Dr. Madden said that all they meant was "provided the lease was in existence," that argument admits that they do constitute a condition precedent but gives to the words a meaning different from that to which they would naturally bear. I can give no meaning to these words and the ingenuity of Counsel has not been able to give a meaning to them unless they constitute a condition precedent and as I must give some meaning to them; I must, decide that they are a condition precedent. If they are a condition precedent do they mean what counsel for the plaintiff suggested they meant and not what they say? I am clearly of opinion that effect must be given to their plain natural and *prima facie* meaning and that they cannot be construed as meaning "provided the lease was in existence." As to how far the cases bear upon the point, I may say with Mr. Justice Kay that I have not found the authorities of much assistance. The only two I have found of assistance are *Finch v Underwood* (2 C. D. 310) and *Bastin v. Bidwell* (18 C D. 238) cited by Mr. Neighbour. One or two cases were cited by Dr. Madden, in which it was held that such words as those in this document did not amount to a condition precedent, and he argued that if those or similar words in one document did not amount to a condition precedent, then they must receive the same construction in every document, and therefore that in no document could they amount to a condition precedent. Now I think this is not a correct argument. In considering each document you have to look to the whole document and draw from a consideration of the whole document and its whole scope and object what the particular meaning of certain words is. Words have different meanings according to the special document in which they occur. In a marine insurance, for instance, you would find that the term "iron" is construed to mean include steel. Whereas a different and narrower meaning will be given to the term "iron" in most contracts between Metal Merchants, seeing that the same words may have different meanings in different surroundings, let us see how these words in question are construed in clauses giving to one person an option. In *Finch v. Underwood* the words were "in case the "covenants on the tenant's part should have been "duly performed;" in this case they are "having duly "paid the said rent and performed the said covenants "in all respects." In *Bastin v. Bidwell* at p. 252 *Kay*, J., treats the words occurring in *Finch v. Underwood* as if they had been what they are in this particular case, and he treats them as condition precedent, on these cases it is clear that the view of *Kay*, J., was that these words were a condition precedent. In my opinion therefore, both on reason and on authority, these words impart a condition precedent. The plaintiff's next answer is that it was waived. I have

tried to appreciate the force of this argument but have failed and it is in conflict with the opinion of *Kay*, J., in *Bastin v. Bidwell*. It is difficult to see how the waiver of a person's right to take advantage of the clause as to re-entry can operate to deprive him of the right to show that the covenants have been broken. The receipt of rent cannot operate to preclude a person from taking proceedings for breach of covenant. If a tenant allows the premises to get into a very dilapidated state contrary to his covenant and the landlord knowing the breach receives rent, he thereby waivers his right to re-enter, but the payment of the rent and the acceptance of it by the landlord are not accord and satisfaction for the breach. This is the view which *Kay*, J., took in *Bastin v. Bidwell*, 18 C. D., where he says at p. 249 (quoting *Mellish, L.J.*):—"Receipt of "rent waives a forfeiture (that is of course the right "of re-entry under a power to re-enter) because it admits "the lease to be subsisting, but does it follow from "that that a condition precedent to granting a new "lease is waived? I confess upon consideration that "satisfies my mind completely. Supposing there was "a waiver of the right of re-entry, it does not seem to "me at all to follow that the precedent condition "would be waived or affected in the least degree." Then it is said the defendant is estopped from setting up the breaches of covenant. In order to deal with this I must first consider the proposition to which the facts will have to be applied. For the purposes of this case that the law may be stated as follows: if a man by words or conduct intentionally leads another to believe in the existence of a certain state of things and to act on that belief so as to alter his own previous position the former is precluded from averring a different state of things as existing at that time. If you construe words or conduct to include silence when it was a duty not to be silent and omissions to act when it was a duty to act the above proposition seems to me to apply to cases both at Law and in Equity and to cover such cases as *Carr v. L.N.W. Ry. Co.*, (L.R. 10 C. p. 307) and *Ramsden v. Dyson* (1 H. L. 129) in which latter case the law is stated in the following words: "If a stranger begins to build on "land supposing it to be his own, and the real owner "perceiving his mistake abstains from setting him "right and leaves him to persevere in his error, a "Court of equity will not afterwards allow the real "owner to assert his title to the land." Is there anything, then, by which the defendant is estopped from saying "you have broken your covenants?" I have to find that the defendant by words or conduct did something which he is now estopped from denying: has he ever by words or conduct asserted that the plaintiff had not broken his covenants, and has the plaintiff in consequence altered his position. I can find nothing of the kind nor can I find anything in which he misled the plaintiff either actively or passively. What is there the defendant did which he now wishes to deny? Nothing that I can find and therefore the plaintiff's answer to the defendant's objection fails and there must be judgment for the defendant. There is one matter I ought to add. It was suggested that there was disrepair. There was no disrepair, and I say this while I am of opinion that a covenant to keep in repair includes a covenant to put in repair. The disrepair proved was that a door, 26 years old, which originally cost £1, has a crack in it. On that part of the case I distinctly find for the plaintiff. I decide against the plaintiff on the question of law. But because the defendant, has put forward such unfounded statements and because his only reason for objecting to the purchase is that the land had increased in value I shall give no costs. Defendant first considered whether he could not defend the option of purchase when an offer was made to him. Therefore, although he is entitled to succeed I shall allow no costs. Solicitors for plaintiff, *Klingender, Dickson, and Kiddle*; for defendant, *A. Grant & Son.*

(Before Hodges, J.)

SAWYERS v. KYTE.

18th July.

Administration action—Separate accounts—Payment out of court—Costs—Master in Equity.

Pursuant to an order made in an administration action, various sums of money when paid into court to the credit of an action were equally distributed over four separate accounts. On motion for payment out of court of the sum standing to the credit of one of these accounts on behalf of the person absolutely entitled, it was ordered that the costs occasioned by the application should be taken from the whole amount in court and should not be levied exclusively on the fund drawn out.

As the action had been commenced before the Judicature Act and as the papers in connection with the action were in the custody of the Master in Equity, the reference was made to the Master in Equity and not to the Chief Clerk.

Motion in the cause of Sawyers v. Kyte and others, for an order *inter alia* directing payment out of court of certain moneys to the applicant and also directing that the costs of the application be taxed and paid out of the money in court standing to the credit of the cause. The action itself had been instituted on or about the 14th September 1868 for the administration of the estate disposed of by the will of Rachel Watson who died on the 28th April 1859. The testatrix left surviving her four children one son and three daughters and by her will she directed that her son should become absolutely entitled to one-fourth share of her estate on his attaining 21 years of age, and that the remaining three one-fourths should be held by trustees upon trust to pay the income of each one-fourth share to each of her three daughters on their severally attaining the age of 21 years or marrying under that age during their lives with the usual remainders to

any children of her three daughters. Pursuant to the primary decree made in the above mentioned action and to other orders made from time to time, various sums of money were paid into court to the credit of the cause and when paid in were equally distributed between four separate accounts which were kept for the four children of the testatrix. The son of the testatrix, who attained his majority some years ago had got paid out to him his one-fourth, so that there remained in court 3 equal and separate funds to which the three daughters and their issue, if any, were entitled as is mentioned above. One of the daughters, May Smith, has died leaving an only child, a daughter, Rachel Smith the present applicant. She had attained the age of 21 years on the 22nd October 1887, and consequently under the provisions of the will became absolutely entitled to one-fourth of the estate of the testatrix. There was, accordingly no opposition to the present application, but it was contended by counsel for the applicant that the costs occasioned by the motion should be paid out of the three funds in court proportionately and should not be confined to one, namely, that to which the applicant was entitled.

Guest, for Rachel Smith:—The costs should come out of the whole estate as this application is part of the administration; the rule is that costs should come out of the residue; the fact that the money is allocated to different accounts is a mere matter of accident.

Wynne, for the trustees and Martha Smith (a daughter of the testatrix)—When the question arises as to a particular fund, that fund should bear all the costs; *Jenour v. Jenour* (10 Ves Jr, 563): *The Governesses Benevolent Institution v. Rusbridges* (18 Bear 467); the reference should be to the Master in Equity, not to the Chief Clerk; the suit was started in 1868 before the Judicature Act.

Anderson, for Rachel Watson (the remaining daughter)—The costs should be paid out of the particular fund on each application. In that way each beneficiary would pay an equal amount of costs. If the costs are to be levied off the whole fund, then, those who are latest in drawing out their shares will have to bear the costs of all the preceding applications.

His Honor,—As long as there is a fund in court, it must abide by the consequences of being in court. The fund is in court and all the parties before the court on this application are necessarily and properly before the Court and the application is one in the administration of the estate, and the costs must be paid out of the fund in court; costs of trustees as between solicitor and client. I shall vary this order by making the reference to the Master in Equity, and not to the Chief Clerk, as all the papers are in the office of the Master in Equity and as the suit has been commenced before the Judicature Act.

Solicitors—For applicant, *Gillott & Co.*; for trustees and Martha Smith, *Cuthbert, Hamilton and Wynne*; for Rachel Watson, *R. S. Anderson and Son.*

(Before Hodges, J.)

Ballantyne and Others.

Raphael and Others.

19th, 21st, 24th, 25th, 26th, 28th June.

Contract for the sale of land—Prospectus—Misrepresentation—Concealed vendor—"Companies Statute 1864" Sec. 4.

A syndicate was formed for the purpose of taking over certain land at Campbellfield. The members of the syndicate, as was alleged, were induced to become members by misrepresentations contained in a prospectus that was issued by the vendors. In this prospectus the vendors names did not appear, but, as subsequently transpired, two members of the syndicate who ostensibly were co-purchasers with the other members were in reality also the vendors; shortly before the formation of the syndicate they had purchased the land from the previous owners at about half the price at which they were disposing of it to the syndicate. Subsequently a contract was drawn up whereby the vendors sold the property to one member of the syndicate who acted on behalf of the others. It was alleged by the plaintiffs that during the whole proceeding they had been in ignorance of the fact that two of the members of the syndicate were also the vendors.

Held, that the prospectus was sufficiently misleading as to form a good ground of action inasmuch as having undertaken to state facts it stated those facts incorrectly.

The fact that an ostensible purchaser is in reality a vendor may or may not be material; it would be material if a person who had a knowledge of and belief in another, put his money into the same transaction on the faith of that knowledge and belief.

The syndicate formed by the plaintiffs and defendants for the purchase of the land was not a company partnership or association within the meaning of the "Companies Statute 1864, sec. 4."

The order made in the case of the several plaintiffs who were successful was that the vendors should return to them the money they had paid and give them an indemnity for any liabilities in connection with the syndicate and that on their doing so they (the plaintiffs) should assign to them (the vendors) their interests under the contract.

Action instituted by Ballantyne, Glew, Chambers, Kugelman, Brown, Murray, Lodder, Peatt, Sundercombe, Lazarus, Yeoman, Gordon, Fraser, Waterstrom, Paterson, Cumming, Ryan, George Chambers, and Findlater, against Raphael, Thomas Mitchell, C. W. Mitchell, Molls, Tartakover, Purvis, Wright, Walker, Sutherland, Abraham, Joyce, and Barnacle; the plaintif claimed; (1) A declaration that a certain contract of 1st May, 1888, was null and void; (2) Rescission of the said contract; (3) Return of all

moneys paid and promissory notes given; (4) Alternatively, £300 damages to each of the plaintiffs; (5) An injunction against dealing with or negotiating any of the said promissory notes. The facts were, as follow: On the 21st March, 1888, the defendant Raphael purchased on behalf of himself and the defendant Thomas Mitchell for the sum of £8,772 3s. 9d., certain lands situate at Campbell field, a person named William Barry being the vendor. In April, 1888, Raphael and Mitchell together with the defendants Abraham and Sutherland, who acted as their agents privately, issued a prospectus of a synd cate to be called the Barryville estate syndicate. but this prospectus did nct disclose the names of Raphael and Mitchell as being the venders, or, in fact at all. The prospectus *inter alia*, stated as follows:—I. "This syn- "dicate is formed for the purpose of purchasing sub- "dividing, and selling the property above named "(meaning the said land) situate on the Sydney Road "at Campbellfield Station and right in the centre of "what will be a most important township and district. "The new railway line to Somerton will be opened "in July next, and as the land is within a stone of "the station, the value of it is certainly undoubted. "II. This grand block of property every inch of which "is available for building purposes has been secured "upon the most advantageous terms, 91 acres 2 roods "and 34 perches, at £16,500 for the whole estate. "III. In syndicating this valuable estate the vendors "are more anxious for a quick return than a large "profit." The plaintiffs owing, as it was alleged, to the representations contained in the prospectus, and to statements made by Abraham and Sutherland to the effect that Raphael and Mitchell had taken shares in the syndicate, applied for and took shares and paid a deposit of £200 each, being, all the time, in ignorance of the fact that the real vendors were Raphael and Mitchell. The next step in the transactions was a contract entered into between Raphael as vendor, and Abraham on behalf of the purchasers, dated the 1st May, 1888, whereby Raphael sold the land to the syndicate for £16,500 to be paid in the manner therein specified. The plaintiffs stated that this contract was made secretly and in collusion, and that they had no knowledge that Raphael was the vendor, having entrusted the business to Abraham. Subsequenly Raphael was appointed solicitor to the syndicate, the plaintiffs still remaining in ignorance of his position as vendor. In due course Raphael accepted title to the land on behalf of the syndicate and shortly afterwards a trust deed was prepared by which the land, for convenience in dealing with it, was vested in 4 of the defendants. In this deed Raphael was mentioned as being the vendor, but it was alleged by the plaintiffs that this deed was not read over or explained to them and that they remained in ignorance of the fact that Raphael was the vendor. On this state of facts the plaintiffs claimed as is above mentioned. In addition to traversing all the material allegations of the plaintiffs, the defendants, Raphael and Abraham contended that the syndicate consisting as it did of 33 members was an illegal partnership under the 4th section of the *Companies Statute* 1864 and therefore that the plaintiffs could not maintain the action. They also contended that the plaintiffs had entered into possession of the land and had publicly offered it for sale with knowledge of all the facts and that subsequently they had acquiesced in and ratified by such conduct the contract which they now sought to rescind.

Dr. Madden (*Neighbour* with him) appeared for the plaintiffs.

Topp (*Weigall* with him) appeared for the defendants, Raphael, Mitchell, Abraham and Sutherland. The other defendants did not appear.

His Honor said:—The action is brought by the plaintiffs against the defendants, seeking to have a contract made with them and others rescinded, a return of the moneys paid and the promissory notes given under the contract, and in the alternative £300 damages to each of the plaintiffs. The ground on which the claim is made is that the plaintiffs were induced to enter into the contract by what was practically a fraud on the part of four defendants, Emanuel Sydney Raphael, Thomas Mitchell, A. B. Sutherland, and A. S. Abraham. It appears from the evidence that on the 31st. March, 1888, the defendant Raphael signed a contract by which he purchased certain land at Campbellfield from one William Barry. The land was purchased at the rate of about £90 per acre. That land as purchased by him included some land, extending up to the Sydney road, as well as the land marked in the plan annexed to the prospectus in a light colour. That contract was in the name of Raphael only as purchaser, though as a matter of fact the defendant Thomas Mitchell was a partner with him in the transaction, and had a right to a half share in the purchase and whatever profit resulted from it, the land having been so bought by Raphael on behalf of himself and Mitchell. Raphael said that he shortly afterwards had offers for the land going up to £140 per acre. None of the persons who were willing to give that amount had been produced, and I do not think it probable that any such offers were of any substantial value or would have resulted in a contract at that figure. I pass that by without further comment, and come to the next event in the history of the transaction. Raphael then saw the defendant Abraham and they had a discussion about the property. In consequence of that discussion the defendants Abraham, Sutherland, and Raphael had a meeting, at which it was resolved between the three that Abraham and Sutherland should endeavor to form a syndicate to give a price which was admittedly higher than could have been got from private individuals. Abraham and Sutherland were to get £700 if they succeeded in forming a syndicate which would give Raphael £175 per acre for that portion of the property which he had purchased from Berry, which was coloured brown on the plan annexed to the prospectus. That agreement having been made, the plan and the prospectus were prepared, and according to the evidence of Sutherland they were submitted to Raphael before being issued. Mitchell, the other defendant also saw them either before or shortly

after they were issued to the public. These two men, as well as the two agents, had seen the land, and could tell whether or not the prospectus and plan were mis leading. After carefully considering the evidence, and seeing the place I have no hesitation in saying that it was a cleverly devised scheme to mislead everybody who saw the plan and the prospectus and did not see the land, and that in all the most material portions the plan and prospectus were absolutely untrue and misleading. The prospectus stated that the railway station was within a stone's-throw of the land, and looking at the plan it would seem as if—though that was not strictly accurate, there was inaccuracy only, a little colouring matter—the station were within a short distance, say something considerably under a quarter of a mile from the land. Acording to the plan itself the station would only be 170 yards away. As at this point the Sydney road was only a chain wide. It appeared by the plan that the station was substantially abutting on the Sydney road, though the line was a short distance from it, so that, according to the plan persons who purchased the Barryville estate would have immediate access to the station. As a matter of fact the station was not near it, and it was difficult to see how access could be had from the road to the station. It was something that might be evolved in future years, but at present it was impossible to say how far people might have to travel from the land in dispute before they got to the station as land would have to be acquired for a road from Sydney Road to the station; or if any roads do exist, they do not exist at the nearest point of Sydney Road to the station; but, as a matter of fact, the station marked on the plan did not then exist There could be no doubt that it was placed there intentionally to mislead, and that it did mislead. The station, as a matter of fact, was from a mile to three quarters of a mile from the nearest point on the Sydney road. It was said in excuse that the person who drew the plan had pointed out to him by Mr. Barry a house where the station was to be, and had been thereby misled. But that place was far away from the road, and it was outrageous on that representation to mark the station on the place where it was on the plan. It was also absolutely improper to mark the station on the plan as an accomplished fact because some person judged that that was where it was likely to be, when only a preliminary survey had been made. The statement in the plan was absolutely false, and persons who bought the Barryville estate for subdivisional purposes would have found if they had wanted to subdivide and sell at once that there was no existing station, and when a station should come into existence that it would be far away from them. The next objection was that it was intended by the plan and prospectus to suggest that this land was near the township of Campbellfield, whereas, as a fact, it was one mile and a half from it. I feel no doubt that the persons who made the plan and prospectus so intended, and knew that the land was far distant from the township and yet intended other persons to act on what the plan and prospectus so suggested. Persons might put into a prospectus their bright dreams as to the future and their convictions as to what would come to pass, and people taking shares on representations of that kind could not be allowed to complain because these dreams or convictions never became realities. But where a prospectus undertook to state facts, not prospects then those facts must be truthfully stated. There must not be any statement of fact in it which was likely to deceive a person who did not know the facts, or which was not fairly accurate. Another important matter in which the plan is misleading is that it would appear that two streets are open to the Sydney road, which are not open. I have no hesitation in giving redress to persons who relied upon the prospectus and the plan, and who had not lost their right to relief by their subsequent conduct. Another representation made at the time, and which was relied on by some of the plaintiffs, is that the purchasers were induced to join this syndicate by a statement that Raphael and Mitchell were purchasers, and that the prospectus did not disclose the fact that they were also vendors. That may or may not be a most material statement; whether it is so or not depends on the person's knowledge of or belief in the persons spoken of. If a man had knowledge of, and belief in, another, considering that other a shrewd capable business man, it would be most natural for the former to feel that he could put his money into any venture in which the latter was a co-adventurer, provided he was in the venture on the same footing as the latter. A representation, therefore, that Raphael was one of the purchasers might be a material misrepresention. It was a misrepresention because in saying he was a purchaser it implied that the land did not belong to him, and that he was not vendor. As a matter of fact the supposed purchaser was not a purchaser at all. He retained part of the land instead of selling the whole of it, and it might be material representation for the reasons above stated. Then it was said, that on the faith of the prospectus in some cases, and the representation as to Mitchell and Raphael being purchasers in others, certain persons joined together and formed the syndicate. That having been done, a meeting of the syndicate was called for the first June, 1888. It was said that so far from Raphael's name being concealed as the vendor, on that occasion Raphael stated he was a vendor. I have come to the conclusion that if that statement was uttered it was muttered, and muttered in such a way as not to be heard generally by the persons present or to convey to anyone the fact that Raphael was the vendor. The persons who attended that meeting did not know that Raphael was the vendor. If they had known it at that time, it would have struck the minds of some of them, if it had not struck the minds of all of them, that they should have a person to protect them in the contract which they were making with the vendor, or they would not have been willing to allow the vendor who drew up his own contract to protect himself to be the only

person to represent their interests on its being executed. I find that at that meeting the purchasers were not told that Raphael was a vendor. What took place in the appointment of Raphael as solicitor is difficult to comprehend, for it is very hard to believe that any person who was practising the profession of a solicitor for four years, and had been trained for five years in an office before he was admitted, should not have seen the impropriety of his accepting the position of solicitor to the purchasers without some explanation to them of the conflicting interests which he would have to watch, and the conflict between his interest and his duty. But at that meeting it was proposed that Raphael should act as the purchasers' solicitor, and without one single word he accepted the appointment. Thereupon it became his duty to watch their interests and see that nothing was inserted by him in the contract which would prejudice their interests without a full and complete explanation of the whole of it to the persons for whom he was acting, Raphael said that he believed Abraham and Sutherland explained to the syndicate that to one of the roads leading from the syndicate land to Sydney road, the syndicate might get no title and that the contract protected him from giving such title. Raphael might expect the agents to discharge their duties honestly, but to expect them to go out of their way to explain legal difficulties, and to discharge the duties of a solicitor was what he had no right to expect. He protected himself against giving a title to the road, but did nothing to protect the syndicate. That conduct throws a good deal of light on many other things, because it appears to me that if Raphael at that time had thought the transaction would have borne the light of day he would not have allowed himself to be appointed solicitor, and would not have taken the responsibility of protecting the syndicate against himself. But the blush which one witness said passed over his face at the time when he was appointed solicitor looked very much like the blush on the cheek of one who felt that his enemy had been delivered into his hands. This makes me discredit his honesty in getting up the plan and prospectus. Passing over these very unpleasant events, and coming to later times, it appeared that trouble arose when someone discovered that as a matter of fact Raphael and Mitchell were vendors. A meeting was called and there was a large attendance of the members of the syndicate Raphael and Mitchell attended. Raphael was asked if he was the vendor, and he said he was. Mitchell was asked if he had any interest in it, and he replied that Mrs. Mitchell had an interest in some land, but it had nothing to do with this. Mitchell said that statement was true. In one sense it was true, but in another it was a lie. It was intended to convey the impression to the persons at the meeting that he denied having any interest in the land, and suggested an interest by Mrs. Mitchell in some other land adjoining. There is a passage in the judgment of Lord Blackburn, in *Smith v. Chadwick*, 9 Appeal Cases, 201, which I will quote as expressing my views on the subject :—

"If with intent to lead the plaintiff to act upon it they put forth a statement which they know may bear two meanings, one of which is false to their knowledge, and thereby the plaintiff putting that meaning upon it is misled, I do not think they can escape by saying he ought to have put the other. If they palter with him in a double sense it may be that they lie like truth but I think they lie, and it is a fraud. Indeed, as a question of casuistry, I am inclined to think the fraud is aggravated by a shabby attempt to get the benefit of a fraud without incurring the responsibility." Mitchell said that he believed they all knew that he had an interest in the property ; but if they did, why should he make the statement he had ? They did not all know it, and Mitchell meant them to understand that he had no interest, and Raphael was present and heard this statement made by Mitchell and though he was solicitor for syndicate and knew this statement was misleading he kept silence. Mitchell now said that he entered into the arrangement with Raphael because the partnership deed into which he had entered with his mother prohibited him from entering into such transactions. But that only showed that if he was willing to mislead his partner, and that partner his mother, he would be willing to mislead the persons who joined him in this speculation. I will therefore disbelieve the evidence of Raphael and Mitchell where they were contradicted by any witness except the plaintiff Lodder. In considering whether the plaintiffs were induced by any of these acts to enter into this contract, I will refer to the remarks of Lord Blackburn, 9, Chancery Appeals, 196, where he said "And whenever that is a matter of doubt, I think the tribunal, which has to decide the fact, should remember that now, and for some years past, the plaintiff can be called as a witness on his own behalf, and that if he is not so called, or being so called does not swear that he was induced, it adds much weight to the doubts whether the inference was a true one. I do not say it is conclusive." With regard to the persons not called, and for whose absence there had been no explanation, I have come to the conclusion that they were not called because they had no grievance. I will therefore give judgment for the defendants as against the plaintiffs, J. S. Sundercombe, A. J. Fraser, and S. Findlater, without costs. As to the plaintiff, J. S. Lodder, he knew the plan of the land was incorrect, and looking at his conduct throughout the judgment would be given for the defendants against him with costs. As regarded the plaintiff, Martin Ryan, his grievance was substantially that he did not know that Mitchell was the vendor. There would be judgment for him against Raphael and Mitchell with costs, and the form of the order would be that the defendants, Mitchell and Raphael, should return to him the money he had paid, and give him an indemnity for any liabilities in connection with the syndicate, and that on their doing so he should assign to them any interest he had under the contract. As to the other plaintiffs I will give judgment against the defendants for Waterstrom, Ballantyne, Chambers, Paterson, Brown, Gordon, Glew, and Murray with costs ; and judgment

for the defendants as against the other plaintiffs, as they had not proved that they had induced to take the shares by misrepresentation. I give judgment for the defendants Sutherland and Abraham as against all plaintiffs without costs. In giving this judgment I wish to add that Mr Sutherland's evidence was very unsatisfactory, and he did not appear to be a witness of truth. I do not rely on his evidence except with reference to the authority for the sale of the land. I also wish to add that I gave the relief in the form in which I have done because I have some doubt whether a rescission of the contract could be given here, as it would affect a number of other persons. There is nothing however, to prevent me making an order which would put the successful plaintiffs and the two guilty defendants in the same position as far as possible as they were in at the time the contract was entered into. It was only another way of assessing the damages, and a more sure way, as it was uncertain whether the damages might not be estimated too high or too low. If the plaintiffs and the defendants were the only parties to be considered there could be no doubt that the contract should be rescinded and the money returned. The mere fact that the defendants had lost a market was not a circumstance which the Court should regard in placing the parties in the position they were in before the trouble arose. Western Bank of Scotland v. Addie L.R. I.H.L. Sc : 145. If any of the property—if a foot of the property—had been sold it would have been different ; I could not have made the order. But as none of it was sold I think I can give the relief in the form in which I have ordered it. With regard to the question whether any relief could be given, it was suggested that this was an illegal association, and consequently no relief could be given against the defendants. I find as a fact that there was no illegal agreement, that the persons who asked others to join and those who join did not intend to do anything contrary to the law, and did not agree to do anything contrary to the law, that the syndicate associated themselves together for the purpose of purchasing this property and intended as soon as the property was purchased and that a deed should be drawn up which would enable this property to be disposed of without any breach of the law. Further if this syndicate had themselves disposed of the property as well as bought it they would not in my opinion have been carrying on any business and could not be said to have entered into any agreement for the carrying on of a business, and that they and the persons who joined the syndicate did not intend to carry out the proposed disposal of the land in any way contrary to the law. They meant, as soon as they got possession of the property, to make an arrangement which would enable them to dispose of it in a perfectly legal way, and that their solicitor should draw up such a trust deed as would enable them to carry out that intention. I am also of opinion that this was not an association for the purpose of carrying on any business. There was no carrying on of business such as was meant by the Companies Statute.

Solicitors for Plaintiffs, *Lazarus*; for defendants, *Raphael.*

IN CHAMBERS.

(Before Kerferd J.)

STEEL AND OTHERS v. EAST MITCHAM BRICK COY. AND EAST SUBURBAN PROPERTY &C. COY.

12th, 13th August.

Judicature Act 1883, (*No.* 761) *sec.* 56—*Injunction—Counter-claim—Where a County Court has jurisdiction to deal with all the matters in dispute between the parties, the Supreme Court has no power to make an order restraining the further proceeding of an action brought in the County Court until after the determination of an action brought in the Supreme Court.*

Application on behalf of the plaintiffs to restrain the defendant "The East Mitcham Brick Coy" from proceeding with certain actions brought by it in the County Court for the recovery of calls against the plaintiffs until the hearing and determination of the present action.

It appeared from the affidavits that the defendant "The East Suburban Property Investment Company Limited" had bought certain land which it subsequently sold at a great increase of price to the defendant "The East Mitcham Brick Coy." The plaintiffs became members of "The East Micham Brick Company" and were sued in the County Court for non-payment of calls. The plaintiffs then commenced the present action in the Supreme Court to have their names removed from the register of shareholders on the ground that they were induced to become shareholders by the fraud and misrepresentation of the defendant "The East Mitcham Brick Company" and also claimed to have the contract of sale entered into between the two defendants set aside.

Mr. Weigall in support.

Mr. Neighbour for the defendant, "The East Mitcham Brick Company," took a preliminary objection. The County Court has jurisdiction to hear actions brought for non-payment of calls and also has by sec. 56 of "The Judicature Act 1883," power under a counterclaim to grant the plaintiffs the relief which they seek in the present action. Where an inferior Court has jurisdiction to deal with all the matters in dispute between the parties the Supreme Court will not interfere. Kerr on Injunctions 3 Ed. pg. 576 ; In re The Original Hartleypool Colleries Co., 51 L.J., (ch) 508.

Mr. Weigall in reply stated that similar applications had been allowed on at least two previous occasions.

Mr. Russell for the defendant "The East Suburban Property Investment Co." was not called upon.

HIS HONOR said. I shall not interfere with the proceedings in the County Court. If the plaintiffs in

the present action wish, the whole of the matters in dispute between the parties may be determined in the county court actions and I therefore dismiss the summons. I shall reserve the question of costs.

His Honor on the following day said. Yesterday I reserved the application for further consideration on the question of costs. *Mr. Weigall* informed me that at least two orders had been previously made of a similar character to that asked for, one being made by *Williams J.*, in The Dandenong Estate Company. On the case being presented to me I decided I had no power to issue an order as the County Court had full power to entertain the whole of the matters in dispute under sec., 56 of "The Judicature Act 1883' and to dispose of every remedy. I understand it is the intention of the plaintiffs to appeal from my present order, and I am very glad to hear it, as I think, that where there are conflicting decisions the only satisfactory way to have the matter decided and the practice settled is by appeal to the Full Court. Although I decided against the applicants I reserved the question of costs. Since then I have found the case of Cobbold v. Pryke 4. Ex. D. 315 which seems an authority for my previous decision. In that case an action was commenced in the Exchequer Division against the defendant as administrator of one Pryke. Subsequently proceedings were commenced in the County Court at the suit of a creditor to administer the estate of the deceased and a receiver was appointed. The County Court Judge made an order by way of injunction restraining all further proceedings in the action in the Exchequer Division. On motion for a rule calling upon the County Court Judge to show cause why a writ of Prohibition should not issue prohibiting him from maintaining and enforcing that order it was argued that by the English Act the County Court had had power to issue a restraining order but that that power was taken away by the Judicature Act 1873 since the Chancery Division could not now issue such an order and the power of the County Court was the same now as that of the Chancery Division. Lord Coleridge, C.J., made the rule absolute and in his judgment at page 316 said: "Any doubt, however, is removed when we look at sec. 89 of The Judicature Act, because that section provides that an inferior court, having jurisdiction in Equity shall grant relief in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice, and sec. 91 applies the rules of law enacted by the Act to inferior Courts. Since then, there is now, by the Judicature Act, no jurisdiction in the Chancery Division to make such an order as that appealed against, the power is taken away from the County Court." I may say I have examined the English section of the Judicature Act and find that the corresponding sections of our Judicature Act are *in ipsissimis verbis*. The effect of that judgment is to show that, by The Judicature Act, the power of the Chancery Division to restrain by injunction proceeding in an inferior court is gone, and therefore, that as the County Court possessed only the same powers as the Chancery Division, that power was likewise taken from it. I am of opinion that, as the power is taken away from the Chancery Division, the Supreme Court has not the power to grant the order as asked. I dismiss the application with costs to be taxed and I certify for counsel.

Solicitors for plaintiffs, *Pavey, Wilson* and *Cohen*; for defendant "The East Mitcham Brick Co." *Davies, Price* and *Wighton*; for defendant "The East Suburban Property, etc., Co.," *Taylor* and *Russell.*

Before Kerferd J.

Peters v. Ross; Gedye [Garnishee.]

——— 14th, 15th August.

Rules of Supreme Court 1884, *Order XVII. rr.* 1, 2—*Order XLV. r.* 1—*Garnishee proceedings—Death of judgment debtor before Rule Nisi for a Garnishee order obtained—No personal representative of the judgment debtor appointed—Where a judgment debtor has died garnishee proceedings should not be instituted until a personal representative of the judgment debtor has been appointed.*

Garnishee Order absolute.

Mr. McArthur, for the Garnishee, to show cause:—Judgment in the action was obtained on the 8th July 1889, the judgment debtor died on the 12th July; execution was issued on the 17th July, and the order *nisi* was obtained on the 22nd July. The application should not be made until administration has been taken out. He cited *Burton v. Roberts* 29 L.J. (Ex.) 484, *Wood v. Dunn* L R. 1 Q.B. 77 and Chitty's Forms 12 Ed. 459.

His Honor said:—I will consider the matter.

His Honor, on the following day, said:—It appears that after the judgment was obtained the execution debtor died and that after his death the execution creditor issued execution against the estate of the deceased; he then obtained a rule *nisi* for a Garnishee Order. On the motion absolute Mr. McArthur appeared for a garnishee and objected that the record was not complete in as much as no person had been appointed as personal representative and that until that was done the motion could not succeed. Under Order XVII. r.r. 1 and 2 provision is made in the case of the marriage, death, or insolvency of any of the parties the action shall not be abated. These rules contain what was the law under the Common Law Procedure Statute. It appears to me that Rule 2 makes provision for the completion of record. At the present time the record is defective in as much as the debtor is deceased, no personal representative has been appointed, and no application has been made under Rule 2 of Order XVII. Rule discharged with costs to be taxed. Certify for Counsel.

Solicitors, for execution creditor, *Klingender, Dickson & Kiddle*; for Garnishee, *Wisewould, Gibbs, & Wisewould.*

Before Kerferd J.

GUNN v PIERCE.

21st August.

Rules of Supreme Court 1884, *Order XXXI rr.* 21, 26—*Interrogatories—Heading—Payment into Court—The words constituting the heading to interrogatories are to be taken into account, and therefore, where the interrogatories together with the heading exceed* 5 *folios, the party exhibiting the interrogatories should pay into Court such further sum as is required by Rule* 26 *of Order XXXI.—Until such further sum has been so paid, the party interrogated cannot be required to answer.*

Application on behalf of the defendant for an order that the plaintiff do within 24 hours answer certain interrogatories administered to her or that the plaintiff's action be dismissed for want of prosecution.

It appeared from the affidavits that an order was obtained by the defendant for leave to deliver interrogatories to the plaintiff. The interrogatories were exhibited and that the time within which they should have been answered had expired a considerable time. Two letters were written by the defendant's solicitor to the plaintiff's solicitor warning him that the time had expired and that unless the answers were served this summons would be taken out. To neither of these letters was any reply made.

Mr. Anderson in support, The application is made under Order XXXI r. 21 which provides that "If any party fails to comply with any order to answer interrogatories he shall be liable to attachment. He shall also, if a plaintiff be liable, to have his action dismissed for want of prosecution."

Mr. Box to oppose. The interrogatories administered to the plaintiff exceed 5 folios by 31 words and only L5 has been paid into Court by the defendant before delivery of the interrogatories instead of L5 10s. as required by Rule 26 of Order XXXI: which Rule also provides that the party interrogated shall not be required to unless and until the proper payment into court has been made.

Mr. Anderson in reply. The interrogatories apart from the heading do not exceed 5 folios. The question is whether in a case of this kind the heading should be counted. In any case the defendant should not have to pay the costs of this application because the plaintiff's solicitor ought to have told the defendant's solicitor what his objection to answer was and not have left him in the dark.

HIS HONOR said:—The defendant has not complied with the Rules and therefore the summons must be dismissed. I shall however dismiss it without costs on the ground that the plaintiff's solicitor chose to keep the defendant's solicitor at arms length instead of letting him know the objection there was as to answering the interrogatories. All solicitors are liable to make slips and they should in my opinion, take up a very different position to one another to that taken up by the plaintiff's solicitor in this instance.

Summons dismissed without costs, I certify for counsel.

Solicitor for plaintiff, *Hopkins*; for defendant, *Pavey Wilson, & Cohen.*

(Before Kerferd, J.)

IN THE MATTER OF ISABELLA SMITH, AN INFANT.

Habeas corpus—Where an unmarried woman of the age of 19 *years is living in adultery with a man, the Court will not grant a fiat for a writ of habeas corpus, unless it is proved that she is deprived of her liberty, and detained in custody by some person.*

21st. and 22nd. August.

Application at the instance of Catherine Hewitt for a writ of *habeas corpus* directed to one Dangers to compel him to briug up the body of Isabella Smith an infant aged 19 years.

Mr. Donovan in support.

HIS HONOR said:—Isabella Smith, whose age is 19, is living with a married man named Ernest Herman Dangers, and Mr Donovan has applied for a writ of *habeas corpus* to bring her up with a view of her being influenced or induced to reside with her guardian. The jurisdiction of the Court to deal with cases of this kind was conferred by the 14th. section of the *Supreme Court Act*, which conferred upon the Supreme Court of Victoria the jurisdiction which was exercised by the Lord High Chancellor of England in appointing guardians of the estates of infants and other persons. That section conferring jurisdiction upon the Court was construed by the very old case of *in re Hunter*, which is reported in Kerferd and Box's Digest, page 329, to be restricted to the inherent jurisdiction of the Lord Chancellor and does not include any jurisdiction conferred on the Lord Chancellor or the Master of the Rolls. This Court has frequently exercised that jurisdiction, and the sole reason which induced me to reserve my decision was that the infant in this case is an infant only in the strictly technical legal sense, and is really a grown woman. The doubt I had was whether the Court could deal with her, she being 19 or 20 years of age. The infant being of the age of 19 the power of the Court would not be exercised unless it could be shown that she was deprived of her liberty and was detained in custody by some person. In those circumstances she would stand in exactly the same position as any other subject of the realm, and a writ of *habeas corpus* would go as a matter of right. There were no affidavits to show, and, in fact, it was not suggested that she was being detained in custody against her will by the man with whom she was living. On the contrary, the state of facts rather led to the inference that she had gone to live with Dangers voluntarily, and intended to live with him. There were, however, circumstances in connection

with the case which, if I had not rested my judgment upon the ground of age, would have induced me to pause before granting the application, namely, that the person with whom Miss Smith was living had been committed to take his trial on a charge of abduction, and I would have to consider whether serving him with a writ of *habeas* to bring up the person of the infant would not possibly prejudice him in his trial. I will add that I quite concur in the desirability of the application being made to the Court, and I think it is one which the Court would lend itself to as far as it legally could, as the case is a very deplorable one. There is a way which might be suggested by which the Court would have power to act, and that is that the income to which the infant is entitled might be paid into Court. She might then be made a ward of Court, and the power of the Court to protect her and punish by imprisonment any person disposing of her without the authority of the Court would be full and complete. I would suggest that the Master-in-Equity should be communicated with as to the feasibility of carrying out that plan, viz., paying the interest which she was entitled to into Court, and making her a ward of Court.

Solicitor for applicant, *Albert Read.*

(Before Judge Quinlan).

LEGEL v. LEFEBVRE.

14 August, 1889.

Instruments and Securities Statute No. 557. *s.s.* 6. 7. 8. 9. *Caveat against filing Bill of Sale. Caveator creditor of one of several Grantors. Interpretation of Statutes Act.*

A creditor entitled to lodge a caveat against filing of a Bill of Sale granted by 2 or more persons must be a creditor of the grantors jointly and not of one of them separately.

This was an application made to His Honor Judge *Quinlan* by two persons Messrs. Legel and McConachy who were partners and the grantees of a Bill of Sale for an order for removal of a caveat lodged by Louis Charles Lefebvre against the filing of the instrument. The ground for the caveat was alleged to be that McConachy one of the grantors was indebted to the caveator in the sum of £60 the amsunt of a dishonored promissory note. It appeared from the evidence that the note was given in part payment of the price of a wine-shop business carried on at the Alexandra Theatre and that the Caveator had commenced an action in the Supreme Court to recover from McConachy the amount of the note. The defendant had obtained leave to defend on an affidavit setting up a failure of consideration because the plaintiff Lefebvre had no title to the lease or license of the wine-shop and further that the note was not duly stamped. On the present occasion the same defences were indicated by the cross-examination of the caveator with the addition that as it appeared that part of the consideration for the note was a permission to carry on a wine-shop by an unlicensed person—such was illegal and therefore the whole transaction was invalidated.

Mr. Duffy for the grantees and Mr. Bryant for the caveator.

At the close of the evidence for the Caveator in support of the Caveat Mr. Duffy submitted that the order asked should be made on the following ground. That according to the true construction of the Act the creditor lodging a caveat must be the creditor of all the grantors if more than one, and he referred to the second Schedule to the Act where the words "creditor or creditors," "grantor or grantors" are placed in opposition. To adopt any other construction would render it possible for a mere salaried partner in a firm consisting of five or six persons to put a stop to the business of the whole body unless they chose to be black mailed into payment of a butcher's or baker's bill of the salaried partner. The words "or either of them" could not be read with the section. He also submitted that the consideration for the promissory note was tainted with illegality.

Mr. Bryant for the Caveator argued that the word grantor should be attributed to anyone of the grantors and as to the illegal consideration that at most it only formed part of the consideration and did not effect an avoidance of the whole transaction.

Mr Duffy was not called upon to offer any evidence for the grantees.

HIS HONOR in giving judgment said that he was not at all satisfied with the evidence of the Caveator, but apart from that he was of opinion that the creditor should according to the true construction of the Act be the creditor of all the grantors (if more than one) as a body and he must read the word "grantor" as for that purpose "grantors," and he could not interpolate the words "or either of them" after the word "grantor." He was also of opinion that the illegal consideration tainted the whole transaction and that therefore the Caveator had no remedy on the promissory note. He would therefore order the Caveat to be removed, with £3 3s. costs.

Solicitors; for Caveator *A M. Williams*, for Grantees, *Crisp, Lewis* and *Hedderwick.*

PROBATE JURISDICTION.

(Before Hodges, J.)

IN THE WILL OF HENRY COX DECEASED.

25th July.

Practice Probate—Old will not proved—No personalty—Probate for purposes of title—Death of testator before "Administration Act 1872 *"—The court will not grant probate of a stale Will, merely to give greater facility for making title—especially where there is no personal property left for probate to operate upon.*

Re Jones 12 V.L.R. 307 followed.

Motion for grant of probate of the Will of Henry Cox deceased. The testator died in 1869 leaving real property to the value of L250 and personal property of no value at present. By his Will, made in 1856, he devised and bequeathed all his property to his wife and appointed her sole executrix. In the affidavit made by her it was averred that she did not previously apply for probate as she was ignorant of the necessity of doing so until recently when she sold the real estate and was then advised that it was necessary. Application had been made to the Registrar who declined to act without the direction of the Court.

Wasley, appeared in support and cited *Re Jones* (10 A.L.T. 185.)

His Honor; I will consider the matter.

His Honor subsequently said; This matter had been dealt with in several cases and was fully discussed by Webb J., "*In the Will of David Jones*," (12 V.L.R. 307) the facts of which are similar to those in the present case. In that case counsel urged that the court had no jurisdiction to refuse to grant probate on the ground of delay in the application, but the court held that this was a matter within its discretion. *Webb*, J., there followed the principal previously laid down by *Molesworth*, J., "that the court will "not grant probate of a stale will merely to give "greater facility for making title." The point again arose in "*In the Will of Harris*" (14 V.L.R. 217) but that case was distingushed from "*In the Will of David Jones*" (12 V.L.R. 307) by the fact that in the former case there was personalty in existence and therefore the court granted probate. The latest reported case is "*In the Will of Jones*" (10 A.L.T. 185). From the report of this case it does not appear that any of the previous decisions were cited or even considered by the court and no reason was assigned for departing from the principle laid down in the former cases. Under these circumstances I prefer to follow the former cases rather than the last one and refuse to grant probate.

Proctor for applicant; *Brayshay*.

SUPREME COURT SITTINGS.

(Before Hodges, J.)

2nd August.

In the Estate of Lawrence Cohen Deceased.

Insolvency Statute 1871—*s 37 subsec. IX., s 42—Promissory Note—Security—Act of Insolvency.*

A promissory note made by the debtor in favor of the creditor is not a security for the debt within the meaning of the Insolvency Statute 1871.

The words "whereby the creditors of such estate may "be defeated or delayed in payment of the debts due by such estate" occurring in section 42 are an adjectival sentence qualifying the preceding term "act of "insolvency;" and the act of insolvency, to render an estate liable to sequestration under the section must be of such a character that its natural effect would be to defeat or delay creditors.

Motion to make absolute an order nisi obtained on a petition under section 42 of the "Insolvency Statute 1871." The petition set out, *inter alia*, that the estate of one Lawrence Cohen deceased was indebted to the petitioner in the sum of £123 6s 7d upon a promissory note made by Lawrence Cohen in favour of the petitioner overdue and unpaid; that Kate Cohen the executrix of the deceased had committed an act of insolvency whereby the creditors of the deceased might be defeated or delayed in obtaining payment of the debts due by the estate inasmuch as at a meeting of creditors of the estate she consented to present a petition under part III of the *Insolvency Statute* 1871 for the sequestration of the estate and did not within 48 hours from the date of such consent present such petition. Objections were filed on behalf of the executrix, which were, so far as is material to this report, as follows; that the debt of the petitioning creditor was secured and the petitioner did not state in the petition that he would be ready to give up such security for the benefit of the creditors or that they were willing to give an estimate of the value of such security; that no act of insolvency had been committed whereby the creditors of the estate might be defeated or delayed in obtaining payment of the debts due by the estate.

Weigall, on behalf of the petitioning creditor was proceeding to discuss the first objection when it was intimated by his honor, that, in his opinion a promissory note made by the debtor himself could not be regarded in the light of a security for the debt within the meaning of the *Insolvency Statute*. As regards the second objection it was contended on behalf of the petitioning creditor that the act of insolvency contemplated by the 9th subsection of section 37 had been committed. *Re Webster* (5 V.L.R. (I) 16) was referred to.

Topp (with him *Hayes*) cited *Re Martin* (5 V.L.R. (I) 13).

His Honor,—In this matter there are two points to be considered. The first is one on which, during the course of the argument, I have expressed an opinion. The petitioner states that he holds a promissory note made by the debtor and it is on the debt existing by reason of this promiosory note that the petition is based. The respondents ays that the petitioner's debt is secured inasmuch as the promissory note amounts to a security, that that security had not been valued by the petitioner and therefore that the order should be discharged. In my opinion when an individual gives his promissory note to provide for the payment of his own debt, that promissory note cannot be said to be a security, within the meaning of the Insolvency Statute, for the payment of that debt. I do not think it matters whether the debt contracted is contained in a promissory note or whether the debtor

entered into the contract under seal by which he covenanted to make a payment. Neither are securities. They are only pieces of paper which contain the promise which create the debt. If the promissory note contained a promise other than the promise of the person indebted the result might be different. If it was the promissory note of somebody else I could understand the argument, and see something in it. But where it is only the promise to pay of the debtor it is simply the document which creates the liability and not the security for the liability. The next objection is the one just argued. The objection is that no act of insolvency has been committed whereby the creditors of the estate would be defeated or delayed in obtaining payment of the debts due by such estate. I have to determine what is the nature of the act of insolvency which must be committed by the executrix in order to make the estate of the deceased liable to sequestration under the provisions of section 42, and, to determine whether the act of insolvency in this particular case is of that nature. I think the act of insolvency, in order to be an act of insolvency under the statute, must be one of which the natural, I will not say—necessary—effect would be to defeat and delay creditors in obtaining payment of the debts due by the estate; and these words "whereby the creditors of such estate may be defeated or delayed in payment of debts due by such estate," are an adjectival sentence qualifying the preceding term "act of insolvency." This question is governed hy the decision of Molesworth, J., *in re Martin*. According to that judgmeut —"the intention to defeat or delay the credit-"ors appears to be an essential ingredient "in the act of insolvency." I have then to see if in this case the act of insolvency alleged is one of which the natural or necessary tendency is to defeat and delay creditors. The act of insolvency is that referred to in the first part of subsection 9 section 37 whereby it is enacted that if "at any meeting of creditors a debtor shall consent "to present a petition under part "III of this Act for the sequestration of his estate, "and such debtor shall not within 48 hours from the "date of his consenting as aforesaid, present such "petition, he shall be deemed to have committed an "act of insolvency." Now is that an act of insolvency of which the natural or necessary effect is to defeat or delay creditors? I have not got to decide whether under the circumstances of this particular case and after the examination of witnesses and after hearing evidence, the creditors might be defeated or delayed. I have to keep all such considerations out of my mind and to consider merely the tendency of the act, if the natural or necessary consequence of it would be to defeat or delay creditors. If the estate be a solvent one, I have no reason to think that the promise and the subsequent refusal to present a petition would naturally or necessarily tend to defeat or delay creditors; and it does not appear to me to be material whether the estate be solvent or insolvent at present. If it be insolvent, I cannot see how it would naturally or necessarily defeat or delay creditors. It might be said that it would, because the particular person who had charge of the estate might not apportion it properly. He might give large amounts to some creditors in disregard of others. But, I have not to consider such matters. I have only to consider the act of insolvency itself; and I cannot see how it has the natural, much less the necessary, consequence of defeating or delaying creditors. The order must be discharged but as the executrix has been playing fast and loose and conducting the negotiation in such a way as would be likely to bring the matter before the court, I discharge the order without costs.

Solicitors for petitioner, *Pavey, Wilson and Cohen*; for respondent, *Lazarus*.

SITTINGS IN BANCO,

(Before Williams Holroyd and a'Beckett J.J.)

M'Manamy v. Fleming.

Justices of the Peace Act 1887—*prisoner charged before the bench with an offence different from that for which he had been arrested—refusal of Justices to grant an adjournment on the application of the prisoner's solicitor on the grounds of surprise—conviction quashed.*

This was an order to review a decision of justices at Melbourne, by which the defendant was ordered to be imprisoned on a charge of having no visible means of support. The order to review was applied for on the ground that the conviction against the prisoner was made on a charge on which he was not brought before the Bench, and the justices refused him an adjournment to allow him to answer the charge. *Cur adv. vult.*

a'Beckett J., in delivering the judgment of the Court said:—It appears by the affidavits in this case that Fleming was arrested on the 23rd of March last with a man named Cathie in consequence of someone having his pocket picked in the vestibule of the Opera House. The prisoners were acting suspiciously and jostled the person robbed, who said he believed Fleming was the man who had robbed him. Fleming had previously been convicted as an idle and disorderly person. At the watch-house the charge entered was "being a rogue and a vagabond." On the 25th of March Fleming was brought before the magistrates and a remand to the 29th was applied for by the apprehending constable and granted. On the 29th counsel for the prosecution stated that Fleming had been previously convicted as an idle and disorderly person, and that the present charge was having no lawful and visible means of support. This in the case of a person previously convicted as an idle and disorderly person subjects him to punishment as a rogue and vagabond under subsection 1 of the 36th. section of the Police Offences Statute. Fleming's solicitor

objected that this was not the charge he was then prepared to meet, and asked for an adjournment to enable him to meet it by evidence, as the onus of proof was on the prisoner. An adjournment was refused for the reasons stated as follows in the affidavit filed on behalf of the Crown :—

"The magistrates, through their chairman, Mr. Call, informed Mr. Gillott that the prisoner was before the Court on the 25th of March, and that he, Mr. Gillott, was present, and had heard the charge and on what grounds the prisoner was charged, and that the magistrates were of opinion that if the prisoner wished to call evidence for the defence he had had ample time to do so; and under these circumstances they could not grant a further remand.,"

Mr. Gillott stated that he was taken by surprise and he refused to cross-examine the witnesses for the prosecution. Fleming was convicted on the charge of having no visible means of support, and obtained an order *nisi* to review the conviction on the ground "that the magistrates ought to have granted an adjournment." Whether they ought to have granted an adjournment or not depends on what occurred on the 25th, or whether Fleming was sufficiently informed on that day that the offence to be proved against him would be having no visible means of support. Fleming states in his affidavit that on the 25th the prosecuting constable did not state to him or to the justices. or to his solicitor, that he intended to charge him with having no visible means of support. This statement is uncontradicted. No affidavit as to what occurred on the 25th is filed on behalf of the Crown, but, in compliance with a request by the Court for further information, Mr. Call states as follows :—

"Constable M'Manamy on his oath stated that Fleming was charged with being a rogue and a vagabond, having been previously convicted as an idle disorderly person, that he was the companion of pickpockets, and he had not known him do any work for 12 months past."

Under subsection 12 of section 36 a person can be convicted as a rogue and vagabond who is a suspected person or reputed thief, found frequenting any place of public resort with intent to commit a felony. Considering that Fleming was arrested for his supposed complicity in pocket-picking in the vestibule of a theatre, the charge was made by the constable, as described by Mr. Call, might well have been supposed to relate to an offence under this subsection. The facts in the mind of the accused and his adviser would have pointed much more to this active form of offence than to the passive form of having no visible means of support. It is true that the constable's reference to his having been previously convicted as a disorderly person would have been mere surplusage if the offence to be charged was one under subsection 12, but a man ought not to be required to spell out the charge against him by mere inference and critical consideration of a constable's language. It is laying down no exacting rule of criminal procedure to require that an offender shall be told in distinct terms what he is to be charged with. In this case admittedly he was not so told, but it is said that he ought to have inferred it from what the constable stated as to the previous conviction and from his own knowledge of how the charge of being a rogue and vagabond might in his case be sustained. Having regard to the fact that the cause of Fleming's arrest was his being apparently engaged in committing a felony, we think that Fleming and his solicitor were entitled to say that they were taken by surprise, and they might have been, in fact, taken by surprise at the charge being "having no visible means of support." This was a charge which might have been met by calling witnesses if the prisoner had been prepared for it. The request for an adjournment seems to us to have been reasonable. We think that Fleming may have sustained injustice by its refusal, and, therefore, that the rule to quash the conviction should be made absolute, on the ground that the magistrates ought to have granted an adjournment.

Order absolute, without costs.

Solicitor for complainant *Crown Solicitor* ; Solicitors for defendant, *Gillott, Croker, Snowden & Co.*

(Before Williams, Holroyd and Kerferd, J.J.)

IN RE ROBERT WILLIS.

Licensing Act 1885 *No.* 857 *Sec* 29—*Application for a grocer's licence in a district where there never was a grocer's licence—Meaning of word "increase" in Sect.* 29.

This was a special case stated by the Licensing Court for the licensing district of Northcote. The applicant, Mr. Robert Willis, had applied for a grocer's licence for a shop in Northcote. This was opposed by another person, on the ground that the Licensing Bench had no jurisdiction to grant such a licence inasmuch as there had not previously been a grocer's licence in the district, and the Licensing Court had no power to grant such a licence. The section of the Licensing Act on which the decision turned was section 29 of the Act 857, which provided that after the commencement of this Act the number of grocers' licences in any licensing district shall not be increased save as hereinafter provided. One-fifth of the number of the persons whose names are for the time being on the rolls of electors for an electoral division of any electoral district forming a licensing district may at any time petition the Governor-in-Council to cause a poll to be taken to determine whether or not the number of grocers' licenses in such licensing district shall be increased to any number beyond the number then existing, but not exceeding one for each full 500 inhabitants of such licensing district hereinafter called the "statutory number of grocers' licences." It was submitted for the applicant that this section did not apply, as there had been no grocers' licences previously granted in the district.

Mr. Hood appeared for the applicant ; *Mr. Box* to oppose. *cur. adv. vult.*

Per Curiam. In this case the applicant applied for a grocer's licence, and the Licensing Bench refused

the application on the ground that there never was a grocer's licence in that district—the Northcote licensing district. It was contended for the applicant that section 29 of the Licensing Statute did not apply to this case, because under that section it was provided that after the commencement of the act the number of grocers' licences in any licensing district should not be increased save as hereinafter provided. It was contended that 'increase" there meant an increase of something by something. The Bench refused the application, evidently on the ground that they thought the object of the act was that all things were to be kept *in statu quo*, and the only alterations contemplated were those provided by the subsequent part of the section. We think the Bench was right in point of law, and that the applicant should pay the costs of the proceedings.

Appeal dismissed with costs.

Solicitor for applicant, *R. S. Anderson & Son;* Solicitors for respondent, *Maddock & Johnson.*

IN CHAMBERS.

(Before Holroyd, J.)

THE GRASSMERE ESTATE COMPANY LIMITED v. ILLINGWORTH & ANOR.

22nd, 23rd August.

Rules of Supreme Court, 1884, *Order XXXI r. r.* 1, 11 *Interrogatories—Answers—Where a defendant has given to the plaintiff a written notice of his intention to apply at the trial for leave to amend his defence, the plaintiff before the trial cannot interrogate him with regard to the subject matter of the proposed amendment—A party interrogated must answer as to his "knowledge," "information," and "belief"; an answer as to his "knowledge," and "belief" is not sufficient.*

Application on behalf of the plaintiff for an order for leave to deliver further interrogatories to the defendants and for an order that the defendant Illingworth deliver a further and better answer to the fourth of the interrogatories previously delivered to him.

It appeared as to the first part of the summons that the defendants had given notice in writing to the plaintiffs stating that they intended to apply at the trial for leave to amend their defence in a certain specified manner. Interrogatory 4, as delivered to the defendant Illingworth, was as follows: "Did you receive a notice from the plaintiff company stating it rescinded the contract with yourself of the 2nd June, 1888, mentioned in the statement of claim, before the notice in writing mentioned in paragraph 4 of your defence herein was signed." The answer was as follows: "I received a notice from the plaintiff company stating it rescinded the contract with myself of the 2nd June, 1888, but I am unable to say of my own knowledge or belief whether it was before or after the notice in writing mentioned in paragraph 4 of my defence."

Mr. Bayles in support.

Mr. Fink to oppose.

HIS HONOR said, I will consider the matter.

HIS HONOR, on the following day, said: This was an application on behalf of the plaintiff for leave to administer further interrogatories, and also to obtain a further and better answer to the 4th of the interrogatories previously delivered by him. With regard to the first part of the summons the application was made in view of an application to be made at the trial on the part of the defendants to amend their defence by adding certain particulars relating to an alleged agreement which took place between one Tremearne who appears to have been one of the vendors, and that this agreement so made was withdrawn. I expressed the opinion when the application was being made that it did not fall within Order XXXI r. 1. That rule is explicit in its terms and I reserved my opinion for the purpose of reading the rule. The rule is limited by two provisos and it is the latter we have to consider in dealing with this matter. The latter proviso is as follows: Provided also that interrogatories which do not relate to any matters in question in the cause or matter shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross examination of a witness. Now there is nothing in this cause or matter relating to this agreement upon which it is proposed to administer these interrogatories, and for anything I know there may never be. I therefore refuse that part of the application. With regard to the second part of the application, the 4th interrogatory and the answer thereto are as follows [HIS HONOR read the interrogatory and answer]. It was contended by the learned counsel for the defendants that this was a sufficient answer as "knowledge" included "information," now information may mean not only absolute information but also the means of obtaining the information. If I know there is a certain document, which, by looking at it would give the information, I ought to look at it. I therefore think that the plaintiffs are entitled to an answer as to the defendant's information and in so far I allow the summons. The plaintiffs fail as to part and succeed as to part, I therefore make the costs of this application costs in the cause. The defendants to deliver a further answer to paragraph 4 of the interrogatories within 4 days.

Solicitors for plaintiffs. Malleson, England, and Stewart; for defendants, Pavey, Wilson, & Cohen.

Before Kerferd, J.

JUDD AND ORS. v. ABBOTT.

26th. 27th. August.

Writ of summons—Amendment—a plaintiff cannot strike out the name of another plaintiff and make him a defendant without his consent.

Application on behalf of plaintiff Judd to amend

the writ of summons by striking out the names of Bagley Bros. as plaintiffs and inserting them as defendants.

It appeared that the writ had been issued in the beginning of July, but that no statement of claim had been delivered; the time for delivery having been enlarged by consent.

Mr. MacHugh in support.

Mr Moule to oppose.

His Honor said: I will consider the matter.

His Honor, on the following day. said: This was an application made by the plaintiff, Judd, to strike out Bagley Bros. as plaintiffs and add them as defendants. There appears to be no rule enabling this to be done directly, although there is a power under the rules which would enable this to be done indirectly, namely, by striking out a plaintiff and adding a defendant. There is no express rule enabling the transfer. A plaintiff cannot be added without his consent, and there is no ground for allowing the plaintiff to get rid of another and make him a defendant without his consent. I think if a plaintiff consents to have his name transferred and be made a defendant, subject to the payment of costs, there is no objection. There are many reasons why it may be expedient; one plaintiff may have settled the action or he may have done some act which would imperil the action. In this case the Bagley Bros. have indorsed a consent. The proposal is a complete change of everything, and so far as the defendants are concerned they may have incurred expenses costs which by reason of this change may be thrown away. I shall make the order and that the plaintiff pay to the defendants the costs of and occasioned by the transfer and of this application which latter costs I fix at £3 3s. I certify for counsel.

Solicitors:—For plaintiff Judd, *Lynch, McDonald Stillman and Keep;* for defendants, *Moule and Seddon.*

PRACTICE COURT.

(Before Kerferd, J.)

In re The Fire Marine and Accident Indemnity Co., Limited, Ex. parte Burdekin.

23rd. 27th. August.

Companies Statute, 1864 (*No.* 90) *sec.* 33—*Rectification of register—Repudiating Shareholder—A repudiating shareholder must not only repudiate, but also get his name removed from the register, or commence proceedings to have it removed, before the winding up of a company.*

Motion on behalf of Burdekin, a shareholder in the Fire Marine and Accident Indemnity Coy., Limited, calling upon the Company to show cause why a summons should not be issued to remove his name from the register.

The facts appear sufficiently from the judgment.

Dr Madden, in support, relied on *Reese River Silver M. Co. v. Smith* L.R. 4 H. of L. 64, and *Oakes v Turguand* L. R. 2 Holr. 325.

Mr Bryant, to oppose, contended that the application was made too late. *In re Scottish Petroleum Co*, 23 Ch. D. 413; *re the Gambrinus Lager Beer Brewing Co.* 12 V.L.R. 446.

His Honor on a subsequent, day said this was an application for leave for a summons to be signed by a Judge calling upon the Company to show cause why the name of Sydney Burdekin should not be struck off the register of the Company. The application was supported by affidavit of Burdekin and in that affidavit it is alleged that he was induced to become a shareholder in the Company by fraud and misrepresentation contained in the prospectus of the Company with regard to the capital and the amount of business done by it. He was Chairman of the Local Board of Directors at Sydney and occupied that position for about two years, and he states that he was unaware during the whole of that time that any fraud had been practised upon him in inducing him to become a shareholder; that at the end of that time there was an arbitration case in which the Company were involved and from the evidence taken in that arbitration he learned for the first time of the fraud which had been committed and of the misrepresentation which had been made at the time he was induced to become a shareholder: he learned this in July about one month before the winding up order was obtained and the application is now made for this summons to be signed after the winding up order had been obtained. Objection was taken by counsel on behalf of the Company that the application was made too late. I am of opinion that it is too late and that the authority which was cited by Dr. Madden as showing that it is not too late is one which when examined falls within the rule as laid down in *re* The Scottish Petroleum Coy., 23 ch D. 413 which may be considered the leading case on this subject. The rule applicable to this class of cases is clearly explained in the judgment of Lindley L.J. at pg. 436 where his lordship says "If we look at these cases to see what principle is to be deduced from them, I think we find that the shareholder who seeks to be discharged must have done two things; he must have repudiated the contract have got his name taken off the register, subject to the qualification that if he has before the commencement of the winding-up taken proceedings to have his name removed that will be sufficient. There is a further encroachment on this rule, namely, that if one shareholder commences litigation to have his name removed, and there is an agreement between the Company and other repudiating shareholders that all the cases shall stand or fall by the result of his litigation, then if that case is decided in favour of the litigant shareholder the others will be relieved, Pawle's case L.R. 4 ch. 497. But there is no authority that can be relied on for carrying

the modification of that rule any further. The rule is that the repudiating shareholder must not only repudiate, but also get his name removed, or commence proceedings to have it removed, before the winding up." These observations apply to the facts in this case. The repudiating shareholder took no steps to have his name removed; in fact he does not appear to have repudiated except to the solicitor of the company before the winding-up order was obtained. In pursuance with the authority referred to I refuse the application with costs.

Solicitors for the applicant; *Attenborough, Nunn* and *Smith*; for the Company, *Madden* and *Butler*.

(Before Higinbotham C.J. Williams and a'Beckett J.J.)

IN RE KEOGH.

Justices of the Peace Act 1887. Conviction when punishment is by imprisonment—warrant of commitment—admissibility of affidavits to contradict recitals in the warrant on a habeas corpus.

Application by *habeas corpus* to review a decision of the Justices of the Central Bailwick at Melbourne.

Keogh was brought up on a charge of being illegally at large in Victoria within the meaning of the *Criminals Influx Act* (1854). The Justices held the offence proved and sentenced Keogh to be imprisoned for 12 months with hard labour and in irons. The warrant of commitment set out amongst other things that Keogh had been previously found guilty of a transportable felony in a court of competent jurisdiction at Sydney. On an application to make absolute an order *nisi* for a *habeas corpus* it was proposed by Keogh's counsel to put in evidence affidavits to contradict recitals in the warrant and to show that there was no evidence before the justices that Keogh had ever been convicted of a transportable felony at Sydney.

Mr. Donovan for the crown takes the preliminary objection that on a *habeas corpus* affidavits cannot be used to contradict recitals in the warrant. Recitals in the warrant cannot be contradicted by affidavit. *In re Devaney* 3 W.W. & a'B (L) 103: certificate of conviction and sentence is good till judgment is set aside. *R. v. Finney* 2 Car & K 774: affidavits are admissible to show want or excess of jurisdiction but if the fact found is merely a fact in the case, jurisdiction having attached, affidavits cannot be used on a *habeas* to contradict the finding; *Bailey's case* per Lord *Campbell* C.J. 3 E & B 614 *Paley on Convictions* 6th Ed p.p. 420 and 421: in this case the statute provides a special remedy by appeal and that remedy must be followed *Box v. Attfield* 12 V. L.R. 7.

Mr. Forlonge to move the rule absolute. These affidavits are admissible to show that the justices had no jurisdiction to make the order: there was no evidence given before them that Keogh had been convicted of a transportable felony in Sydney and proof of that fact was necessary to give them jurisdiction to convict. Affidavits can always be used on a *habeas corpus* to show want or excess of jurisdiction *R v. Bolton* 1 Q.B. 66 *R v. Nunneley* 1 E.B. & E 852 *R. v. Baker* 2 H & N 216 *Re Cornillac* 1 W & W (L) 193 *re Grey* 2 V.L.R. (L) 241: on a *habeas corpus* for a prisoner's discharge affidavits have been received of his illegal arrest on a Sunday though the return on the face of it was good. *In re Eyginton* 2 E & B 717: so on a *habeas corpus* for the discharge of an insolvent affidavits have been used to show his privilege from arrest *Exp. Dakins* 16 C.B. 77. He also referred to 1 Sm. L.C. p.p. 724,727.

THE CHIEF JUSTICE. In this case the warrant of commitment sets out in the information that "on the 8th day of April 1889 at Melbourne in the Central Bailiwick the said Matthew Keogh before then having been found guilty of a transportable felony by a court of competent jurisdiction at Sydney in the Colony of New South Wales the same being a British possession had come into Victoria contrary to the provisions of Act 18 Vic. No. 3, relating to the influx of criminals into Victoria, the said Matthew Keogh not having been lawfully resident in Victoria at the time or previous to the passing of the said Act, and the sentence imposed on the said Matthew Keogh in the said colony of New South Wales not having expired for a greater period than three years prior to his arrival in Victoria as aforesaid." On the 16th April 1889 before Mr. Call Police Magistrate, and a bench of magistrates, the prisoner was duly convicted on this information and ordered to be imprisoned with hard labour and in irons for the period of twelve months. By this present application it is sought to procure the discharge of the prisoner by means of an affidavit alleging that there was no proof given to the Justices in Victoria to show that the prisoner had been convicted of a transportable felony in New South Wales. The only evidence before the Justices is alleged to have been the admission by the prisoner that he had been sentenced to a long term for the offence of assaulting the police but there was no proof adduced to show that this offence constituted a transportable felony by the law of New South Wales. A preliminary objection has been taken by the counsel for the crown that affidavits are not admissible here to show this defect of evidence in the proof of the charge against the prisoner, viz., his coming into Victoria contrary to the provisions of Act 18 Vic. No. 3. We think this objection is a good one and that we cannot entertain this affidavit for the purposes for which it is sought to be brought under our consideration. There is considerable doubt as to the rule of law upon this matter and considerable conflict of decisions on the question as to how far affidavits may be admissible to prove defects in the proceedings of an inferior court when these proceedings result in a conviction sought to be reviewed in a superior court by means of the writ of *habeas corpus* or *certiorari*. It is impossible to reconcile all the decisions on this question; on the one hand it has been held that affidavits are admissible to prove want of

jurisdiction in an inferior court but on the other hand limits have been applied to this rule in order to prevent the conclusion that the lines within which the rule is to be applied are free from limits altogether. We incline to think that the most proper limit to apply to the rule is that affidavits are admissible for the purpose of showing that the jurisdiction of the court below has never attached or that if it has attached during the progress of the case some element has intervened to deprive the court of jurisdiction to deal with the matter then before it. But, if the jurisdiction of the court has attached, and has not been ousted, if the court has continued to be a court and have jurisdiction for the purposes of the matter before it, then no affidavit will be received to show defects of evidence in giving jurisdiction to the court. There are two *dicta* on this subject showing the limits of the rule: the first is that in the judgment in *Bunbury v. Fuller* 9 Ex. at page 140 "It is a general rule that no court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends, and however its decision may be final on all particulars, making up together that subject matter which, if true, is within its jurisdiction and however necessary in many cases it may be for it to make a preliminary inquiry, whether some collateral matter be or be not within the limits yet upon this preliminary question its decision must always be open to inquiry in the superior court. Then to take the simplest case—suppose a judge with jurisdiction limited to a particular hundred, and a matter is brought before him as having arisen within it, but the party charged contends that it arose in another hundred this is clearly a collateral matter independent of the merits; on its being presented the judge must not immediately forbear to proceed, but must inquire into the truth or falsehood, and for the time decide it, and either proceed or not with the principal subject matter according as he finds on that point; but this decision must be open to question and if he has improperly either forborne or proceeded on the main matter in consequence of an error on this the Court of Queen's Bench will issue its mandamus or prohibition to prevent his mistake." The second dictum is in Smith's Leading Cases 9th Ed. Vol. 1 where at page 726 the editor says "Possibly the distinction may be between cases in which the conviction or order is made by persons who are admitted to constitute a legal court, and who have stated facts, which on information being laid, or a case coming before them, would be matter to be proved *and adjudicated upon by them*, and cases in which the objection is, that they are not a court at all, because not in fact magistrates, or because interested, because they sat out of the limit of their jurisdiction, or for some other reason, striking at their existence as a court so that the objection is not that the statement of a court is erroneous but that the source of the statement is not a court at all." The rule thus stated is approved by Baron Bramwell in *In re Baker* 2 H & N 219. This rule has not been always strictly followed but we think it is the nearest approach to a proper rule which has been yet suggested and we intend to apply it to this case. The Act 18 Victoria No. 3 provides in sec. 2 "It shall be lawful for any two justices of the peace before whom any such suspected person shall have been brought on proof that such suspected person has come into Victoria contrary to the provisions of this Act to convict him thereof." These words include all the conditions precedent to the justices' jurisdiction as to power to convict, such as—that the suspected person has been found guilty of a transportable felony in New South Wales and the non expiry of his sentence for a greater period than three years previous to his arrival in Victoria: all these elements are capable of legal proof. We think that the jurisdiction of the justices attaches whenever a suspected person is brought before them on this charge. Jurisdiction being thus attached to them cannot be ousted by the production of affidavits showing that the justices neglected to obtain sufficient evidence that the person charged had come into Victoria in contravention to the provisions of the Act mentioned. There is in this Act a special provision that a person feeling aggrieved by the adjudication of the justices may appeal from it, and thus when the justices are in error by neglecting to procure sufficient proof against the person charged, the whole matter may be argued over again and the person aggrieved may obtain a remedy for an unjust conviction, but he cannot do so by having recourse to *habeas corpus* or *certiorari*. We are therefore of opinion that the order *nisi* for a *habeas corpus* must be discharged but without costs.

WILLIAMS, J.—This point is a very thorny one. Mr Forlonge has made a very able contention supported by authorities difficult to distinguish in a satisfactory way but the solution may be that affidavits are admissible to contradict the recitals in the warrant so far as to show that the justices had no jurisdiction ot entertain the charge against the prisoner on which they convicted him, but affidavits are not admissible to any further extent than that, namely, to show that the justices never had jurisdiction attaching to them or that some good cause in the progress of the hearing must have deprived the court of jurisdiction. It appears to me Mr. Forlonge's contention goes too far when he attempts to show by affidavit defective procedure on the part of the justices—when he proposes to show that the justices took the action they did and came to a conclusion which on the evidence may be thought unsatisfactory. Mr Forlonge's arguments would go to this length that in the case of larceny of a watch there might be a similar application here by the prisoner to show there was no sufficient evidence of the identity of the watch. Section 15 of Act 18 Vic. No. 3 enacts that the remedy for any person who feels aggrieved by the decision of the justices is to be by appeal and there is no ground in this case for substituting *habeas corpus* or *certiorari*: appeal is distinctly provided as the proper remedy. Affidavits are not to be looked at for the purpose of showing that the justices adjudicated on insufficient proof presented to them when they have jurisdiction

to adjudicate on the case. Therefore I am of opinion that the affidavits should not be allowed as admissible in the manner we are invited to hold them admissible in this case

Order nisi discharged without costs.

Solicitors—For prisoner, *A. W. Fergie;* for Crown, *Crown Solicitor.*

(Before Higinbotham C.J. Holroyd and Kerferd J.J.)

THE SOUTH SUBURBAN LAND AND FINANCE COMPANY, LIMITED v. HUGHES AND ANOTHER.

4th Sept. 1889.

Rules of Supreme Court 1884—*Pleading—Action for specific performance—defence raises Statute of Frauds—Reply of part performance—Alleged departure.*

Appeal from an order of *a'Beckett* J. dismissing defendants summons to strike out paragraphs 3 4 5 and 6 of the reply.

The action was one of vendor against purchaser for specific performance of a contract for sale of certain lands. In the statement of claim the plaintiffs relied on an agreement in writing and the defence raised the *Statute of Frauds.* The material paragraphs in the reply were as follows :—

3. After the agreement mentioned in the second paragraph of the statement of claim one G. H. Jamison who was lessee of the public house mentioned in the second paragraph of the defence and also of the shop mentioned in the 8th paragraph of the statement of claim which shop was used as part of the said hotel applied to the defendants as purchasers of the said land to extend his lease of the said shop so that it would expire at the same time as the lease of the said hotel and the defendants and the said G. H. Jamison went over the premises together and the defendants then agreed to extend the lease of the said shop if the said Jamison would make certain alterations which were then pointed out by the defendants to the said premises and the said Jamison agreed to make such alterations and the said Jamison on the faith of the said agreement with the defendants expended about £200 in the said premises in making the said alterations with the knowledge and consent of the defendants.
4. The defendants after the said agreement mentioned in the 2nd paragraph of the statement of claim attempted as such purchasers as aforesaid to sell the said premises and authorised auctioneers to sell the land.
5. The plaintiffs will object that by reason of the facts stated in the 3rd and 4th paragraphs hereof the defendants are estopped from raising the defence that the memorandum does not comply with the 107th section of the *Instruments and Securities Statute* 1864.
6. The plaintiffs will further object that by these acts mentioned in the 3rd and 4th paragraphs hereof the defendants took possession of the said premises and that there has been a part performance of the said agreement sufficient to take the case out of the operation of the said 107th section.

The defendants took out a summons to strike out the above paragraphs of the reply on the grounds that the said paragraphs raised a new ground of claim, that they did not form a proper matter for reply, and that they tended to prejudice embarrass and delay the fair trial of the action.

The summons was heard in Chambers before *a'Beckett* J. when it was dismissed with costs and from this order the defendants now appealed.

Mr Higgins for the defendants appellants.

In the statement of claim the plaintiffs rely on an agreement in writing and in the reply they rest their case on part performance. These are two different claims and the allegations of part performance should have been raised either originally or by amendment in the statement of claim. Order 28 rule 2 giving the plaintiff the right to amend the statement of claim without leave before the expiration of the time limited for reply points the proper course the plaintiffs should have adopted. Part performance is a material fact on which the plaintiffs rely for their claim and should have been so pleaded. One portion of the claim is pleaded in the statement of claim and another claim is inserted in the reply; this is embarrassing and should be struck out under order 19 rule 27. The reply cannot be inconsistent with the allegation in the claim; here it is a clear departure. *Green v Hoyne* 14 V.L.R 220. He also referred to *Angus v Jenkins* 14 V.L.R. 117; *Warnock v Victorian Railways Commissioners* 7 A.L.T. 54; *Berdan v Greenwood* 3 Ex. Div. 256 and *Hamilton's Judicature Act* page 356 appendix C. no 12 forms of statement of claim in actions for specific performance.

Mr. Topp for plaintiffs respondents.

Part performance need not have been set up in the statement of claim. It was not necessary to anticipate defence of the *Statute of Frauds*; the defence of the Statute is an objection to evidence of the contract sued on and that defence might never have been raised. The old Common Law rule of pleading that you should not leap before coming to the stile is still in force *Hall v. Eve* 4 Ch. D. per *Bramwell* L.J. at 346. The reply is not a new case: it is something alleged to get rid of the defence. The test is if the defendants strike out their defence of the *Statute of Frauds* the plaintiffs will strike out the paragraphs of the reply objected to. He referred to *Hordern v. Smith*, a case decided on the 26th. of June, 1889 and not yet reported.

Mr. Higgins, in reply cited *Kitson v Hardwick* L.R. 7 C.P. 473; *Pearson v Russell* 9 A.L.T. 2; *Duckworth v McLelland* 2 L.R. (I) 527; *Bateman v. Kingston* 6 L.R. (I) 328 and *Phillips v. Phillips* 4 Q.B.D. 127.

HIGINBOTHAM, C.J.—This is an appeal against an order of *a'Beckett, J.*, dismissing a summons calling

on the plaintiffs to show cause why certain paragraphs of their reply should not be struck out. The action is one of specific performance brought by plaintiff as vendor of real property and he founds his statement of claim on a memorandum in writing by which he alleges that on a certain date the plaintiffs agreed to sell certain lands to the defendants who agreed to purchase the same for a sum therein mentioned. The defendant in his defence alleges that the whole agreement was not contained in the memorandum and that the memorandum was not to be binding until a formal contract with particulars and conditions was drawn up. It was contended before the learned judge that the plaintiff's reply of part performance by the defendants and that they attempted to sell the lands and were therefore estopped from setting the defence of the *Statute of Frauds* was a departure in the popular sense under the old system similar to the rule now laid down by Order 19 rule 16 which forbids any pleading except by way of amendment to raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same. It was also contended that the statement of claim should have contained what was in the reply as being material facts which should have been pleaded under Order 19 r. 4. Judging this question by the old rules of Common Law determining what is or what is not a departure it cannot be contended that the reply is a departure which would be bad on general demurrer. That old rule was regulated in its application by the term in which it was expressed—bad, because it departed from the case originally made; but it was never held that matter to maintain explain or fortify the original ground was a departure. We think that substantially Order 19 r 16 is to the same effect, and that by prohibiting any new ground of claim it does not prohibit something to support the original pleading. What is known as part performance under the 4th. section of the *Statute of Frauds* is a doctrine of Equity which was not until recently recognised in Common Law but is founded on the rule of Equity that a person shall not be permitted to assert that the *Statute of Frauds* has not been complied with if such assertion be contrary to Equity and unjust. The allegation of part performance in the statement of claim would therefore appear in the present case to be not a material fact for the plaintiff to rely on at a time when it would not appear that the defendants intended to commit an act which was inequitable by pleading the *Statute of Frauds* as a defence. The contract in writing constituted his claim; when the defendants have set up the defence of the *Statute of Frauds* part performance becomes then, and not till then, a material fact in support of the plaintiff's original case. We think that setting up part performance in the reply does not constitute a departure or a new statement of claim bad or general demurrer or otherwise open to objection. We think the learned judge right in holding that the contention that the reply was embarrassing was not supported and that he said nothing to prevent the defendants answering the reply by rejoinder.

HOLROYD, J. I only wish to add that it appears to me that this case is on all fours with *Hall v. Eve*; in that case the plaintiff proceeded on an agreement; a defence, amongst others, relied on was this, that one of the defendants had committed a breach of contract which enabled the other defendants to put an end to the agreement sued on which they had accordingly done. The reply is that it would be a fraud in Equity to set up that defence. The reason why part performance of a contract is allowed to dispense with the necessity of evidence of the *Statute of Frauds* being complied with is simply, that the *Statute* is not to be used for fraud. In *Hall v. Eve* the reply amounted to this—there are certain reasons which render it inequitable that you should be allowed to rely on the *Statute of Frauds*.

KERFERD, J. I concur and I only desire to add that the *Statute of Frauds* is a weapon of defence not of offence. Under the *Judicature Act* the rules of Equity are to prevail. If a man takes the benefit of a contract it is inequitable in him to use the *Statute of Frauds* to perpetrate a fraud. It was unnecessary to state in the statement of claim the facts raised in the reply as the plaintiffs could not contemplate the *Statute of Frauds* being pleaded and they were not material facts under Order 19 r. 4 to support the claim.

Appeal dismissed with costs.

Solicitors for the appellant, *Eggleston, Derham* and *Martin*; Solicitor for the respondents, *Hockin.*

(Before Higinbotham, C.J., Holroyd and Kerferd JJ.)

MUNRO & Co v. O'HANLON.

3rd Sept.

Rules of Supreme Court 1884—*Order XVI r.r.* 4 and 11—*Application by plaintiff to add defendants—Meaning of words "questions involved in the cause or matter."*

Appeal by the plaintiff from an order of *Williams J.*

The facts of the case and the judgment appealed against are reported in 11 A.L.T. 3.

Mr. Hood for the appellant:—The decision of *Williams J.*, rested on certain dicta of *Lord Cairns* in *Kendall v Hamilton* 4 App. Cas. 504; those dicta referred to an application by a defendant to add a co-defendant and are no authority for the present case in which the application is by the plaintiff. Moffat could have been originally joined as a defendant under Order 16 r. 4. Order 16 r. 11 was framed to avoid plurality of actions and to enable every question involved be decided in one suit and is applicable to the present case; here the liability of Moffat is a question involved in the action; the words "questions involved in the action" are wider than the words "questions in the action"; *Edwards v Lowther* 45 L.J. 417. He also cited *Byrne v Brown* 22 Q.B.D. 657 and *Ayscough v Bullar* 41 Ch. D. 341.

Mr. Weigall for Moffat. It must appear from the facts as pleaded that other parties may

be necessary to the action before the Court will add a party. The Statement of Claim shows no right against Moffat; O'Hanlon's name is on the register and no other person can be sued for calls. To make Moffat liable the Statement of Claim would have to be amended by claiming for a rectification of the register and this is not asked for. The test is—could the defendant have pleaded non-joinder in abatement.

Mr. Irvine for the defendant. Order 16 r. 11 only applies where there is a defect either from non-joinder or misjoinder of parties, (*Higinbotham C.J.*—A plea in abatement under the old system must be taken at the first step; this rule appears to go further and to provide for the joinder of parties at any stage.) If the matter in dispute can be completely determined in the existing action the rule does not apply; the question turns on the meaning of the word "involved"; involved means to be determined on the questions in issue; all the questions in issue in this action can be determined without the presence of Moffat. The true test is laid down by *Lord Cairns* in *Kendall v. Hamilton* at page 516. He also referred to *Pilley v. Robinson* 20 Q.B.D. 158; *Harry v. Davey* 2 Ch. D. 721; *Norris v Beazley* 2 C.P.D. 80; *De Hart v Stevenson* 1 Q.B.D. 313; *Dalton v. Guardians of St. Mary Abbots* 47 L.J. 349. [*Higinbotham*, C.J., referred to the judgment of *Jessel* M.R., in *Child v. Stenning* 5 Ch. D. 695]. *Ayscough v. Bullar* is distinguishable; it was decided under Order 16 r. 2. *Byrne v. Brown* is referred to and distinguished by the learned primary judge in his judgment. [*Holroyd*, J. referred to *Marquis of Londonderry v. Lead Mining Co.* W.N. (1879) 136.

Mr. Hood in reply. The cases cited for the defendant were cases in which the application to add a defendant was made by the defendant and not by the plaintiff. He cited *Creaton v. Midland Railway Co.* 10 L.R. (I) 74.

Per Curiam. This is an appeal from an Order of *Williams*, J., refusing to add as a defendant W. T. Moffat. We think that the learned judge was in error in refusing to grant the application. The learned judge appears to have based his judgment on a dictum of Lord *Cairns* in *Kendall v. Hamilton.* In that case Lord *Cairns* says "I cannot think that the Judicature Acts have "changed what was formerly a joint right of action "into a right of bringing several and separate actions. "And although the form of objecting by means of "a plea in abatement, to the non-joinder of a defendant "who ought to be included in the action, is abolished, "yet I conceive that the application to have the 'person so omitted included as a defendant ought to "be granted or refused, on the same principles on "which a plea in abatement would have succeeded or "failed." If this were an application by a defendant to join a co-defendant at this stage of the action the dictum of Lord *Cairns* would be applicable But it is not applicable to the present case which is an application on behalf of the plaintiff to add another defendant. The right of a plaintiff to add a defendant is determined by the joint operation of rules 4 and 11 of Order 16. Rule 4 states "All persons may be "joined as defendants against whom the right to any "relief is alleged to exist whether jointly severally or "in the alternative." In this case the plaintiff might have sued the defendants O'Hanlon and Moffat, either jointly, severally or in the alternative when he originally brought his action. Rule 11 provides "No "cause or matter shall be defeated by reason of the "mis-joinder or non-joinder of parties and the Court "may in every cause or matter deal with the matter "in controversy so far as regards the rights and in-"terests of the parties actually before it. The Court "or a judge may, at any stage of the proceedings, "either upon or without the application of either "party, and on such terms as may appear to the "Court or a judge to be just, order that the names of "any parties, whether as plaintiffs or as defendants "improperly joined be struck out; and that the names "of any parties, whether plaintiffs or defendants who "ought to have been joined, or whose presence before "the Court may be necessary in order to enable the "Court effectually and completely to adjudicate upon "and settle all the questions involved in the cause or "matter be added." Now the last words enable the Court to add a defendant where it appears necessary to enable the Court completely to settle all questions involved in the action and the question arises what are the questions involved in this action. The principal question raised between the plaintiff and original defendant is who is liable to pay certain calls owing the plaintiff. The defence of the original defendant involves the suggestion, that another, who transferred the shares, on which the call is owing, to the defendant, may be the person liable. We think that on the facts disclosed by the defendants' defence a question is raised as regards both defendants—as regards the original defendant, whether he may not be liable in damages instead of debt, and in respect to Moffat, whether he may not be liable for damages for his acts whereby he divested himself, it may be wrongly, of his shares. The words "involved in the cause or matter" have been the subject of several decisions and we think that the decisions shew that these words include more than the words "in the action." Lord *Coleridge* says in *Edwards v. Lowther* "Although the question between "the plaintiff and Green may not be the question in the "action, still it is a question involved in the action. And further the observations of *Jessel*, M. R., in *Child v. Stenning*, shew that a claim against a new defendant may be a new claim involved in the action although it be inconsistent with the original claim between the parties. The extent of the rule is clearly expressed by *Denman*, J. in *Norris v. Beazley*, "I am not prepared to say that that rule is to be con-"fined to cases in which the plaintiff having made a "particular claim and stated a particular cause of "action, the person sought to be introduced is a "person who is affected by, and who ought to be "included in that claim. I think there may be cases "where, though a person is not within the scope of "the plaintiff's attack in the first instance, he ought

"to be introduced as a defendant to enable the court "to settle all the questions involved in the action." We think that the question raised in this action requires for its settlement the addition of Moffat as a defendant. We think therefore that the appeal must be allowed and as the plaintiff has succeeded in the appeal, he should have the costs of appeal. The costs of the defendant O'Hanlon up to and inclusive of the application for amendment will be costs in the action between the plaintiff and the defendant O'Hanlon. The cost of the proceedings below as between the defendant Moffat and the plaintiff will be costs in the action between the plaintiff and Moffat. The order should follow the order in *Marquis of Londonderry v. Lead Mining Company* except as to costs.

Appeal allowed with costs: order that plaintiff be allowed to amend writ and statement of claim by adding Moffat as a defendant with proper statements to charge him; costs of defendant O'Hanlon up to and including application to be costs in the action as between himself and the plaintiff; costs of added defendant to be costs in the cause after order as between himself and the plaintiff; costs of summons already paid to be repaid.

Solicitors for the plaintiff, *Malleson, England, & Stewart:* Solicitor for defendant, *A. M. Williams*; solicitors for Moffat, *Maddock & Johnson.*

(Before Higinbotham C.J. Holroyd and Kerferd J.J.)

REG. v. THE LICENSING COURT OF YARRAWONGA.

——— 2nd September, 1889.

Licensing Act 1885 *s.s.* 18, 41, 66, 70—*Where the Licensing Court grants a license for a house that is intended shall be built in accordance with certain plans and specifications and shall be completed by a certain date the Court has no power to extend the time for completion—Under such circumstances the Court should direct a rehearing.*

Appeal from a judgment of *Williams J.* making absolute an order *nisi* for *certiorari* to bring up and quash a decision of the Licensing Court of Yarrawonga.

The facts and judgment of the Court below are fully reported in 10 A.L.T. 227 under the title in *Re Ross*

Mr Box (with him *Mr. McArthur*) for the appellants. The objectors have no *locus standi*; the proceedings of the 8th December and the subsequent proceedings were only matters between the appellant and the Licensing Court (*Holroyd J.* Is there any issue of a certificate till the final issue? If the objectors have a right to appear have they not a right to go through to the end?) No the objectors have only a right to appear in the first instance; they are not objectors within the meaning of s. 70 which deals with objections to licences and renewals. The act does not say that the conditions on which the application for a licence for a new house is granted must be strictly complied with. (*Higinbotham C.J.* s. 66 provides that the time within which the house must be erected is to be determined by the Licensing Court—Can the Licensing Court alter that determination otherwise than by a rehearing.)

Mr. Hood for the objectors respondents was not called on.

Per Curiam. We think from the reasons suggested by the bench during the course of *Mr. Box's* argument that the decision now appealed against was correct and that the Licensing Court had no power to alter its determination as to the time for the completion of the house in conformity with the plans and specifications and therefore it had no power to alter the certificate of completion after that time had been erroneously extended by an order which the Licensing Court had no power to make.

Appeal dismissed with Costs.

Solicitors for appellant *Wisewould Gibbs & Wisewould* agents for *Turner & Abernethy* Solicitors for respondent *Smith Emmerton & Johnson.*

(Before Higinbotham, C.J. Holroyd and Kerferd, J.J.)

——— 9th Sept.

IN THE WILL OF HOLMES

The Administration Act 1872 (No. 427) Sec. 25—Commission to executors—the court has no power to allow commission to one of several executors—an executor taking legacy under the will not necessarily thereby deprived of right to commission.

Appeal *exparte* from an order of *Hodges J.*

Appellants were John Burne and Henry Holmes the executors of the will of Henry Holmes. By his will the testator bequeathed to one William Holmes and his executor Henry Holmes the income arising from his residuary estate in equal shares with remainders to their children and he also bequeathed to his executor John Burne the sum of £250. There were no words in the will in any way indicating that the bequests were intended to remunerate either of the executors for their trouble. On application to *Hodges* J. under sec. 25 of *The Administration Act* 1872 that the executors be at liberty to pass their accounts and be allowed a commission, his Honor made the order for commission as regards the executor Burns but refused it as regards the executor Holmes on the ground that he had taken a large interest under the testator's will.

Mr. Hayes for the executors appellants. Both executors join in the appeal as the executor Holmes having been disallowed commission refuses to join in passing the accounts. An executor cannot apply to pass accounts and for commission without the concurrence of his co-executor: *In re Cameron* 1 A.L.T. 128. Executors must arrange *inter se* how commission is to be divided and apply to the Court as a body: *Re Henry* 1 A.L.T. 92. Executors jointly appointed are considered at law as one individual

Williams on Executors 7th Ed Vol. 1 page 245 and Vol. 2 page 946. The primary Judge was therefore wrong in dealing with them separately, he should have either allowed them both commission as executors or disallowed it. The mere fact of taking a legacy however large under a will is not sufficient *per se* to deprive the executor of his right to commission; there must be some words from which it can be inferred that the testator intended the legacy to be a full remuneration to the executor for his trouble. He cited *re Pender* 1 A.J.R. 141, *re Rolfe* 5 A.J.R. 92, *re Millin* 2 V.L.R. (I) 86, *re Kay* 2 V.L.R. (2) 94, *re Sargood* 4 V.L.R. (I) 43 and *re Fellowes* 5 V.L.R. (I) 82.

Per Curiam. This was an *exparte* appeal from an order made by the learned primary Judge on an application by executors for liberty to pass accounts and that commission be allowed to both. The learned Judge has allowed commission to one and disallowed to the other and states that he did so on the ground that the executor to whom he had not allowed commission had taken a very large legacy under the will. The decisions cited clearly show that the fact that an executor is also a legatee is not sufficient to deprive him of his claim for commission unless it appears clear that the testator intended the legacy to be a remuneration for his services, and in the present case the will shows no such intent. We think that either both or neither of the executors should receive commission: sec. 25 of *Administration Act* 1872 provides that the court or master can allow out of the assets of any deceased person to his executor such commission not exceeding £5 per centum as shall be just: the court deals with executors as a body but does not recognise them individually; they must apply as a body for commission and they may arrange amongst themselves as to how the commission is to be distributed and that distribution is a matter with which the Court will not formally interfere. We think the proper course will be to grant the appeal and discharge the order of the learned Judge altogether leaving it to the parties to make such further application as they may be advised and on such materials as they think proper to be adduced. No order as to costs.

Appeal allowed and order of the primary Judge discharged.

Proctors for the Appellants *Lynch McDonald Stillman and Keep.*

[On a subsequent day, 19th Sept, on the application of Mr. Hayes *a'Beckett, J.* made the usual order for executors Commission.]

IN CHAMBERS.

(Before Kerferd J.)

——— 28th and 29th Aug.

GREIG & MURRAY v. HUTCHINSON.

Rules of Supreme Court 1884 *Order XVI r* 11—*Joint and separate liability on one contract—Separate action brought against both co-contractors—Judgment signed in both actions—Res judicata—On a joint contract there is only one cause of action and there cannot be two judgments in one cause of action—Where a person, who is in the position of a joint contractor, is sued without his co-contractor being joined, he has a right under Order XVI* r. 11 *to have his co-contractor made a co-defendant with him in the action.*

Application on behalf of the defendant to set aside a judgment entered against him and for leave to appear and defend.

It appeared that the defendant and one Pett were the joint makers of three promissory notes. The plaintiffs issued two writs on these notes one against Pett and another against Hutchinson. No appearance was entered to either of the writs and judgment was signed against each of the defendants on the 2nd August; the judgment against Pett being signed at 11.25 a.m. and the judgment against Hutchinson being signed at 11.26 a.m.

Mr. Isaacs in support.

Mr. Hood to oppose took a preliminary objection There must be an affidavit showing a defence on the merits: Chitty's Archbold 14 ed. pages 266, 267.

Mr. Isaacs:—That cannot be taken as a preliminary objection because the judge must first read the affidavits to enable him to see whether a defence on the merits has been set out or not. The facts show that there is a good defence viz:—*res judicata* and there is no necessity to set that out specifically by affidavit. The moment that judgment was signed against Pett there ceased to be any cause of action against Hutchinson; *Kendall v. Hamilton* 4 app. cas. 504; *King v Hoare* 13 M. & W. 494; *Bank of Australasia v. Miller* 6 A.L.T. 234.

Mr Hood; The judgment is regular in form and therefore there must be an affidavit showing a defence on the merits before that judgment can be set aside.

His Honor said; I will consider the matter.

His Honor on a subsequent day said:—This cause came before me on a summons that the judgment entered in this action be set aside and that the defendant should be at liberty to appear and deliver a defence. There were two writs issued and I have compared the two endorsements and they appear to be substantially the same. There were three promissory notes which were the subject matter of both actions; they were intended in the first instance to have been made by the one person that appears to have been struck out and the alteration initialled. They were then made by H. Pett and P. Hutchinson. No appearance was entered to either of these writs and judgment was signed according to the affidavit on the morning of the 2nd August. The first judgment was signed at 11.25 and the second at 11.26. The application is based upon the authority of *Kendall v Hamilton* 4 app. cas. 504. In that case an old decision of *King v Hoare* 13 M & W 494 was considered in the judgment and approved of. The principle therein affirmed is that on a joint contract there is only one cause of action and there

cannot be two judgments on one cause of action; now in this case there was a joint contract and two separate writs were taken out and two separate judgments have been entered and according to the above authority the later judgment which has been entered would have merged in the former judgment and the judgment satisfied and that the later judgment must be set aside. Under the old form of pleading the difficulty arising by reason of the non-joinder of joint contractors might have been met by a plea of abatement. Under the Judicature Act the plea of abatement is abolished. Provision is made however to meet cases of mis-joinder and non-joinder of parties by Order XVI r. 11. It has recently been decided in *Pilley v. Robinson*, 20 Q B.D. 155, that where a person who is in the position of a joint contractor, is sued without his co-contractor being joined, he has a right under Order XVI r. 11. to have his co-contractor made a co-defendant with him in the action. Now in the writ issued against Pett he might have come to the court and complained that he would have been deprived of his right to contribution against Hutchinson and have asked that he should be made a co-defendant with him and on the authority of *Pilley v. Robinson* the order would have been made accordingly. The defendant Hutchinson might have done the same thing. If either of the defendants had adopted this course the present difficulty would have been obviated. I am of opinion that the judgment against Hutchinson should be set aside but without costs. The judgment against Pett would stand and a wrong would be done against him because Hutchinson was not joined with him. I shall give leave to Pett to apply to have judgment set aside in the action against him so as to enable him to make an application to have Hutchinson made a co-defendant. Solicitors, for plaintiff, *Wyburn*; for defendants, *Crisp, Lewis, and Hedderwick.*

Before Holroyd, J.

18th, 25th, Septbr.

GERTY v. MORRAH.

Instruments and Securities Statute 1864 (No. 204) *Sch. 2—Rules of Supreme Court* 1884 *Order III r. 6 — Writ of Summons—Special indorsement—appearance without leave—A writ of summons indorsed in the form provided by Schedule 2 of The Instruments and Securities Statute* 1864 *and in addition headed "Statement of Claim" and "signed" does not lose its character as a writ under the Statute by reason of this additional indorsement, and therefore a defendant, before he can enter an appearance, must obtain leave to appear and defend.*

Application on behalf of the plaintiff to set aside the appearance entered by the defendant on the ground that the same was entered without the leave of the Court or a Judge and to enter judgment for the plaintiff. It appeared that the writ was endorsed in accordance with the 2nd Schedule of the Instruments and Securities Statute 1864, and was in addition headed "Statement of Claim," and was signed. The defendant, treating the writ of summons as a specially indorsed writ under the Judicature Rules, entered an appearance as of right. It was now sought to set aside that appearance as irregular.

It was contended in support of the application that until appearance, the heading and the signature were surplusage and that after appearance they became operative so as to prevent the defendant from demanding a further statement of claim. The cases of *Norris v. Beazley*, 2 C.P.D. 80 and *Atty. Gen. of N. S. Wales v. Macpherson*, L. R., 3 P. C. 268, were cited. It was contended in opposition that the cases of *Ross v. Taylor*, 7 A. L. T. 145 and *Turnbull v. Ball* 9 A. L. T. 1, settled the matter and decided that as the indorsement given in the Instruments and Securities Statute was signed the writ ceased to be a writ under that Statute and became a specially indorsed writ under the Judicature Rules and that therefore leave to appear and defend was unnecessary.

It was contended in reply that the cases of *Ross v. Taylor* and *Turnbull v. Ball*, merely decided that the addition of these words prevented the defendant from demanding a further statement of claim, but that they did not decide that such addition took the writ out of the Instruments and Securities Statute.

His Honor said, I will consider the matter.

His Honor on a subsequent day said. This was a summons to set aside an appearance entered by the defendant for irregularity on the ground that the same was entered without leave of the Court or a Judge. The writ of summons served on the defendant was drawn up substantially in the form provided by Schedule 2 of the Instruments and Securities Statute 1864, so as to constitute it a valid writ of summons under that Statute. It was also endorsed with a indorsement sufficient to satisfy the requirements of sec. 4 App. of the Rules of Court, and thus would constitute a special indorsement. It has already been held that a writ under the Statute may be specially indorsed. The question I have to decide is whether the addition of a signature to such indorsement has the effect of making the writ a specially indorsed one and taking it out of the operation of the Statute. It seemed at first sight plausible that a plaintiff should not be allowed to adopt two different modes of procedure and that was the objection taken. Order II of the Rules which treats of writs of summons and Procedure generally refers to App. A. and directs that a writ of summons for the commencement of an action shall be in certain forms. It is provided by Rule 6 of this Order that "with respect to actions upon a bill of exchange or promissory note commenced within 6 months after the same shall have become due and payable, the procedure under Part 1 of "The Instruments and Securities Statute 1864 "may be used;" that is to say that a plaintiff may adopt the form of summons provided in the Statute if he commences his action within the proper time. Rule 6 of Order III provides that in certain actions one of which is an action upon a bill of exchange, promissory note &c. "the writ of sum-

mons may, at the option of the plaintiff, be specially indorsed with a statement of his claim. If the action is rightly commenced under the Statute there are no restrictive words in the Rules to prevent a special endorsement being placed upon that writ so that a plaintiff may proceed without an additional statement of claim. There is no reason why this should not be done. The object of the special indorsement is to save additional expense by rendering a further statement of claim unnecessary. I hold therefore that this writ of summons does not lose its character as a writ under the Statute because it contains this additional indorsement; I shall therefore set aside the appearance entered by the defendant with £1 1s. 0d costs. If the defendant desires I will stay further proceedings for 48 hours to enable the defendant to apply for leave to appear and defendant on proper and sufficient materials.

Solicitors for plaintiff, *Crisp, Lewis* and *Hedderwick* for defendant, *Gaunson and Wallace.*

(Before Holroyd J.)

20th Sept.

SUNDERCOMBE v. STUBB.

Rules of Supreme Court 1884 *Order XIX r.r.* 4, 27—*Embarrassing pleading—Pleading matter going only to the question of costs—Matters which merely affect the question of costs ought not to be set up in the pleadings. Ricketts v. Fraser* 8 *A.L.T.* 21 *followed.*

Application on behalf of the plaintiff that the 3rd paragraph of the defence be struck out on the ground that the same tends to prejudice, embarrass or delay the fair trial of the action. The action was for the specific performance of an agreement for the sale of land, and for damages for breach of the agreement. After denying certain paragraphs of the statement of claim and alleging that on the dishonor of a certain promissory note being part of the purchase money for the land the contract had been rescinded under the provisions of the agreement, the defence in the 3rd paragraph alleged:—

> 3. Alternatively the defendant is willing and hereby offers to specifically perform the said contract upon payment of the said promissory note with interest thereon from the due date thereof with her costs of suit to date.

Mr. Weigall in support. The paragraph objected to only goes to the question of costs and is not a material fact which requires to be stated under Order XIX r. 4. Under this rule the pleader is only to state the material facts on which he relies and is not to state facts which are immaterial to the issues. This paragraph is no defence to the action and therefore should be struck out. *Ricketts v. Fraser*, 8 A.L.T. 21.

Mr. Hood-to oppose. The summons is taken out on the wrong grounds. The paragraph in question is not embarrassing to the fair trial of the action. The defendant merely says that she is willing to take the money now if the plaintiff is willing to pay it even though the contract is rescinded. In *Ricketts v. Fraser* it was admitted that this defence would have been properly pleaded under the old equity system. If the defendant chooses to rely upon a bad defence the plaintiff can demur to it. If the defence is bad as being no answer to the claim the proper course would have been to apply to have it struck out under order XXV r. 4.

HIS HONOR said. The 3rd paragraph of the defence is nothing more nor less than a statement that although the defendant is not bound to perform the contract yet she is willing to do so if her costs are paid. This is no defence to the action and must only be intended to go to the question of costs. I cannot see how the plaintiff can join issue on the intention or state of mind of the defendant. I quite agree with the decision in *Ricketts v. Fraser* and think it is a very good one to follow. I therefore allow the summons with £3 3s. costs. The plaintiff to have 4 days to deliver his reply. I certify for counsel.

Solicitors for plaintiff, *Ellison*: for defendant, *Herald.*

(Before A'Beckett, J.)

GRASMERE ESTATE CO. v. ILLINGWORTH.

Sept. 6, 10.

Contract for the Sale of Land—Rescission.

By a contract of sale dated 1 *March* 1888 *A sold certain lands to B: B subsequently sold to C: C to D and D to E. The contract between A and B contained the following condition:—"If the purchaser "shall fail to comply with the above conditions, or "shall not pay the whole of the deposit as aforesaid "or shall not give the acceptances as aforesaid, or "shall not duly pay the promissory notes or accept-"ances given in part payment of the purchase money, "or either of them, his deposit money, or so much "thereof as shall have been paid shall be actually "forfeited to the vendor, who shall be at liberty "without notice to rescind the contract and resell the "property bought by the purchaser by public auction "or private contract, and the deficiency (if any) in "price . . . . . shall be made good by the "purchaser." Subsequently to the sale by D to E, A exercised his power under the condition. Held that the exercise by A of his powers under the condition did not so affect the contractual relation subsisting between A and B as to enable subsequent vendors to put an end to their respective contracts by a notice of rescission.*

Action by the Grasmere Estate Co. against F. Illingworth and the Real Estate Bank for rescission of a contract for the sale of certain land at Dandenong and for a return of portion of the purchase money already paid. The facts are as follows:—On the 1st March 1888 one Tremearne sold the land in question to J. Mirams for £40,000 payable in a certain manner therein specified on the 14th March 1888 Mirams sold

the land to the Real Estate Bank for L48,000. The Real Estate Bank sold to the defendant Illingworth for L60,000, and the last named purchaser on the 14th June sold to the plaintiff Company for L105,000. Shortly afterwards the defendant Illingworth assigned his interest in this contract to the Real Estate Bank who gave notice of the transfer to the plaintiff Company. The contract between Tremearne aad Mirams contained amongst others the following condition :— "If the purchaser shall fail to comply with the above "conditions, or shall not pay the whole of the deposit "as aforesaid or shall not give the acceptances as afore- "said or shall not duly pay the promissory notes or "acceptances given in part payment of the purchase "money, or either of them, his deposit money, or so "much thereof as shall have been paid, shall be actually "forfeited to the vendor who shall be at liberty with- "out notice to rescind the contract and resell the "property bought by the purchaser by public auction. "etc." Mirams failed to pay one of the promissory notes due on the 4th March 1889, and Tremearne gave him notice that he rescinded the contract. The note was paid on the 12th of the same month and Tremearne withdrew his rescission and reaffirmed the contract. In the interval, however, between the 4th and the 12th March the plaintiff Company sent to the defendants notices to the effect that they rescinded the contract between the Company and Illingworth on the ground that the contract between Tremearne and Mirams had been rescinded. It was pleaded (*inter alia*) by the plaintiff that on their solicitors asking to inspect the documents of title they received an incorrect copy of the contract between Treamearne and Mirams, the words to "rescind without notice "having been omitted from the condition above stated.

Isaacs (*Weigall* and *Bayles* with him) appeared for the plaintiff.

Dr. Madden (*Topp* and *Mitchell* with him) appeared for the defendant Bank.

Hood (*Fink* and *Higgins* with him) appeared for the defendant Illingworth.

At the close of the plaintiff's case, the defendants applied for a nonsuit.

His Honor :—I take the facts to be that specific performance of the agreement which the plaintiff company entered into could be given by the defendants. That is to say that the plaintiffs admitted that on payment of what they undertook to pay they could have the property which they meant to buy. But I understand that the objection to completing the contract, and the ground on which the plaintiffs sought to be put in the position so far as they could be put as if they never entered into the contract at all, was, that they had entered into the contract with the defendants, and that by virtue of a condition in the contract with the original vendor and Mirams that contract was absolutely annulled. The plaintiffs said that there was a period in which there was no contractual tie at all between the parties, and in that interval they availed themselves of that annulling or blotting out of the contract to state that on that ground they would not continue the contract with the defendants, and they claimed to have an end put to it as regarded themselves as well as Mr. Mirams, who had originally entered into it. The reason why I think that right did not exist in the plaintiffs is that there never had been a complete annulling of the contract as between Mirams and the original vendor. I think that the word "rescind" used in the condition must be taken in connection with the remainder of the condition, and it showed that it was to be a rescission, if that term could be actually applied at all, *sub modo* and in the way there pointed out. This provision for rescission is altogether different from that which is found in the text books, in which a condition for rescission is that the position was to be the same as if the contract had never existed ; the deposit money should be restored, and the parties placed in their original position. Such a condition would be found in this very contract. There was such a condition that if an objection to title was not renewed the vendor might annual the sale. But the condition relied on by the plaintiffs differed in most material respects from that condition. It provided for a retention of the deposit money, which could only be retained by force of the contract which still existed. It provided as to what should be done with the promissory notes given under the contract in the event of a resale. That which was called a rescission was not a rescission as contemplated by a condition for a rescission which terminated all relations between the parties in point of law, not the continued existence of the contract subject to modifications. I also think, though it is not necessary for my decision, that the condition providing for forfeiture of the deposit, and for rescission in the event of failure to perform any condition such as the failure to pay the last promissory note should receive the same construction as was given to it in a case in 8 Chancery appeals. So I do not think that the portion of law which formed a portion of the plaintiffs' case had been sustained. I think that the contract still existed ; I do not think that it had been legally killed. That is quite apart from the fact, which was a very strong fact, that the contract had been renewed. The plaintiffs contended that there had been no renewal of the original contract, that there had been in point of law a new contract made between the original vendor and Mirams, so that the title which was possessed by Mirams was a new birth—something which had not existed before. I do not think that was the proper legal construction of what took place. What had been done was merely a renewal of the obligations, which might have been broken off, but which were not broken off. There was nothing to prevent the original contract being carried out by Tremearne. He had a right to carry it out ; he was bound to carry it out, and it could be carried out. Then it was suggested that the matter which was mentioned in the reply, and which was to be taken as if it was contained in the statement of claim, showed that the contract which was in pursuance of the conditions handed to the plaintiffs was to be a true copy of the original contract made with Tremearne, whereas

the copy delivered was not a true copy. It was said that the copy delivered omitted certain words, upon which the argument for the plaintiffs hung. It was submitted, therefore, that the plaintiffs were entitled to get out of the contract, they went into the contract by mistake, and they were therefore entitled to rescind it or get some relief on either ground. To my mind it is enough to dispose of that objection to say that the distinction between the two conditions was not, on my construction of the true contract, a material difference. One meant substantially as much as the other. Moreover, the plaintiffs, although they had an opportunity of doing so, did not shape their case by alleging that they were induced by fraud and misrepresentation to go into the contract, and that if they had known of the difference between the two conditions they would not have entered into it. No case for rescission on that ground could properly be taken to have been made. And it appeared to have been only brought forward in answer to a statement in the defence that title was accepted by the plaintiffs. The plaintiffs said they did accept title, but it was under a misapprehension.

I direct a nonsuit with costs.

Solicitors for plaintiff, *Malleson, England, & Stewart*; for defendants, *Fink, Best, & P. D. Phillips and F. Grey Smith.*

PRACTICE COURT.

(Before Hodges J.)

Skinner v Australian and British Land &c. Company, Limited.

6th. 10th. Sept.

Rules of Supreme Court 1884 *Order LXV r.* 12—*Judgment recovered for less than £50—Costs—Where in an action judgment is given for the plaintiff for a sum less than £50 with costs, no mention being made of the scale on which the costs were to be taxed, the presiding Judge intending to allow the costs on the Supreme Court Scale:—the judgment was subsequently directed to be entered up in favor of the plaintiff with costs on the Supreme Court Scale.*

Motion on behalf of the plaintiff that the plaintiff should be allowed costs of the action on the Supreme Court scale. It appeared that at the trial judgment had been given for the plaintiff for £3 odd but that no mention had been made of costs. The present application was thereupon made that the plaintiff should be allowed costs on the Supreme Court scale.

Mr. Higgins in support cited Daniell's Chancery Practice p.p., 805, 819 *Lawrie v. Lees* 7 app. cas. 19, *Huxley v. West London Extension Railway Company* 14 app. cas. 26 and *In re Chapman* 10, Q.B.D. 54.

Mr. Topp to oppose.

His Honor said: I will consider the matter.

His Honor on a subsequent day said: In this case while counsel for the plaintiff was arguing I told him that if I gave judgment for the plaintiff I should certainly do so with costs. In delivering judgment I made an order that the defendant do pay to the plaintiff the sum of £3 odd with costs but I did not say that the plaintiff was to have costs on the Supreme Court scale. Application was made by motion that the order should be that the plaintiff should be allowed his costs on the Supreme Court scale. I awarded costs to the plaintiff and I meant to award them on the Supreme Court scale but at the time I delivered judgment it did not occur to me that it was necessary to say "on the Supreme Court scale" and that if I did not do so plaintiff would only get County Court costs. As I have said I intended to give the costs on the Supreme Court scale and will now so order unless precluded by authority from so doing. *In Lawrie v. Lees* 7 app. cas. 19 Lord Penzance at p.p. 34, and 35 says "I cannot doubt that under the original powers of the Court, quite independent of any order that is made under the Judicature Act, every court has the power to vary its own orders which are drawn up mechanically in the registry or in the office of the Court—to vary them in such a way as to carry out its meaning, and where language has been used which is doubtful, to make it plain. I think that power is inherent in every court." Now in this case the language I used does not fully and accurately convey my then meaning. I intended to give costs on the Supreme Court scale. I think the authority I have mentioned is a sufficient authority for my directing the judgment to be drawn up so as to express my then meaning. I shall therefore direct the judgment to be drawn up in favor of the plaintiff with costs on the Supreme Court scale and judgment to be so entered.

Solicitors for plaintiff, *Skinner*; for defendant, *Crisp, Lewis* and *Hedderwick.*

IN CHAMBERS.

(Before Hodges, J.)

Coldwell v. Hehir.

12th. Sep.

Rules of Supreme Court 1884 *Order XIX r.r.*, 4, 16, 27—*Inconsistent defences may be pleaded together—The question of whether an agreement is in writing or not is a material fact and as such ought to be set out.*

Application on behalf of the plaintiff for an order to strike out or amend paragraphs 1, 3, and 4 of the defence on the grounds that the said paragraphs are inconsistent, and that it is not alleged whether the agreement therein set up was verbal or in writing.

The action was brought by the plaintiff, as payee and holder of a promissory note, against the defendan

as maker. Paragraphs 1, 3, and 4 of the defence were as follows:—

The defendant says:—

1. That he did not make the said note.
3. That, if the defendant made the said note which he does not admit, at the time of the making of the said note it was agreed by and between the plaintiff and the defendant and one John Byars, as agent for S. McDonald and Coy., that in consideration of the defendant obtaining the said firm of S. McDonald and Coy. to endorse the said note and in consideration of the defendant mortgaging to the said firm of S. McDonald and Co. certain property then owned by the defendant that the plaintiff would not require payment of the said note by the defendant but would look for such payment to the endorsers thereof.
4. In pursuance of the said contract the defendant obtained the firm of S. McDonald and Co. to endorse the said note and mortgaged the said property to the said S. McDonald and Coy.

Mr. Hayes in support.—The defendant first says he did not make the promissory note, and then says that if he made the note he made it in pursuance of an agreement. The defendant cannot plead in this way. He must say either that he made the note or that he did not make it. *Greene v. Hoyne* 10 A.L.T., 25; *Brailsford v. Tobie* 10 A.L.T. 194. The defendant in paragraphs 3 and 4 of his defence seeks to set up an agreement but he does not state whether the agreement is verbal or in writing as he must do. *Cuttance v. Thompson*, 10 A.L.T. 40.

Mr. Coldham to oppose.—In *Buzolich v. Vrenderberg* 9 A.L.T. 1, the same objection was taken to almost identically the same defence as the present and the application was dismissed. It is not necessary to state whether a contract is in writing or not where the law will assume that the contract should be in writing. *Young v. Austin* L.R. 4 C.P. 553. We rely on an agreement which is of no effect unless it is in writing. The only ground for striking out a pleading as embarrassing is that the pleading will embarrass the fair trial of the action. *Laffy v. Dougharty* 6 A.L.T. 236. The plaintiff cannot by any possibility be embarrassed by the defence not stating whether the agreement is in writing or not.

His Honor said:—Inconsistent defences were allowed under the old system of pleading and I do not know of anything in the rules which would prevent them being set up now. The question of whether an agreement is in writing or not is in my opinion a material fact and as such ought to be set out. I do not think, however, that the neglect to state whether an agreement is in writing or not is a matter which can be said to prejudice or embarass the fair trial of the action; I therefore allow the summons in so far as it asks for a statement as to whether the agreement was in writing or not, but without costs.

Solicitors—For plaintiff, *Crisp & Cameron*; for defendant, *F. Barrett.*

(Before Williams J.,)

STAHL v. BANK OF AUSTRALASIA.

2nd October.

Rules of Supreme Court Order XXII r. 6 (a.) Order XXIII r.r., 5, 5—Payment into court without admitting liability coupled with a denial of the facts alleged in the Statement of Claim—Reply joining issue on the denial of facts and specifically alleging that the sum brought into court is not sufficient to satisfy the claim—Time for filing memorandum of close of the pleadings.*

Application on behalf of the defendants that the memorandum of the close of the pleadings be set aside as irregular.

The action was for wages alleged to be due by the defendants to the plaintiff as caretaker of certain property. The defence denied the facts alleged and alternatively without admitting liability paid into court the sum of L35 and said that that sum was enough to satisfy the plaintiff's claim. In the reply the plaintiff joined issue on the denials of fact and in paragraph 2 alleged that the sum brought into court was not enough to satisfy his claim. The reply was delivered on the 9th September 1889, no further pleading was delivered and the memorandum of the close of the pleadings was not filed until the 18th September 1889.

Mr. Anderson in support. Order XXIII r. 5* provides that the plaintiff shall file the memorandum of the close of the pleadings within 4 days after the close and that if this be not done the action shall be wholly discontinued. Order XXIII r. 5 provides that as soon as there has been a joinder of issue simply without adding any further or other pleading thereto the pleadings shall be deemed to be closed. It is submitted that the reply in this case is simply a joinder of issue and that therefore the pleadings closed on its delivery and that the plaintiff should have filed the memorandum within four days after its delivery. In the defence the money paid in is alleged to be sufficient to satisfy the claim; the joinder of issue would deny the sufficiency of the amount paid in and therefore a definite statement as to the insufficiency was not required, and should not be allowed It has been decided in *Barnett v. Rose*, 8 A.L.T. 9, and *Bancroft v. Mayor of South Melbourne*, 8 A.L.T. 89, that an objection at law coupled with a joinder of issue takes the pleadings out of the operation of order XXIII r. 5, but an objection at law is something very different to a joinder of issue on the facts.

His Honor: If the reply is something more than a mere joinder of issue has the memorandum been filed in time?

Mr. Anderson. Yes, but the contention is that it is nothing more than a joinder of issue.

Mr. Barrett to oppose. If the reply is bad on the ground that the plaintiff ought to have joined issue then this application is wrong in form; application should have been made to strike the pleading out. The reply is not a mere joinder of issue but is in the usual form of a traverse as to the sufficiency of the amount paid into Court and is practically required by Order XXII r. 6 (a). That being so the plaintiff must give the defendant time to rejoin and then he has four days after rejoinder to file the memorandum of the close of pleadings.

His Honor said: It is admitted that if the reply le in proper form the memorandum of the close of the pleadings has been filed in time. Now Order XXII r. 6 (a.) shows that this reply is correct and is in strict compliance with that rule which provides that "the plaintiff may refuse to accept the money in satisfaction and reply accordingly." This was always done under the old system. Logically the defendant may be right in his contention but the rule referred to points to this system and the old rule undoubtedly prescribed this form. Summons dismissed. Costs of this application to be costs in the cause. I certify for counsel.

Solicitors for plaintiff, *W. H. Ford*; for defendant, *Klingender, Dickson, & Kiddle.*

(Before Williams J.)

Bell v. Kemp. 4th October.

Judicature Act 1883 (*No.* 761) *Sec.* 59—*Administration Suit—Sec.* 59 *of Act No.* 761 *applies to Administration Suits so long as there is property within the jurisdiction.*

Application on behalf of the plaintiff under sec. 59 of *The Judicature Act* 1883, for leave to proceed in an Administration Suit.

His Honor said:—I will consider the matter.

His Honor on a subsequent day said:—Application was made to me by a gentleman from the office of Messrs. Brahe & Gair for leave to proceed under sec. 59 of "*The Judicature Act* 1883." A doubt struck me as this was the first application of the kind made to me. The form of action was an Administration Suit and the doubt which struck me was whether this section was applicable to suits of that nature. I have looked into the matter since and I am quite clear in the matter. I mention it now so that no doubt may exist on the subject. This section clearly applies to suits of that kind so long as there is property within the jurisdiction.

Solicitors for plaintiffs, *Brahe & Gair.*

SITTINGS IN BANCO.

(Before Higinbotham, C.J., Holroyd and Kerferd, J.J.)

Reg. v. Grogan.

Criminal Law and Practice Statute 1864, sec. 11—Attempt to commit murder—Grogan on the approach of a constable drew out of his pocket a loaded revolver but before he could do anything further he was arrested—held, no evidence of an attempt to commit murder.

Arguments on point reserved at trial. Andrew Grogan was convicted before Kerferd J., in the Criminal Court of attempting to discharge firearms with intent to commit murder. His Honor remanded the prisoner for sentence pending the decision of the Full Court as to whether there was any evidence to support the charge. The facts arguments and cases cited appear in the judgments.

Mr. Johnston for the Crown.

The prisoner was not represented.

Sep. 9, C.A.V.

Higinbotham, C.J.—The prisoner was presented, under the 11th section of the Criminal Law and Practice Statute 1864, charged with an attempt to discharge loaded arms with intent to commit murder. The prosecutor, a sergeant of police, was followed by the prisoner on a public road. The prosecutor, suspecting some mischief, approached the prisoner, who thrust his right hand into his trousers pocket and drew out a loaded revolver. Before the prisoner had time to make any movement with his hand the prosecutor closed with him, seized his hand, and a bystander immediately afterwards took the revolver from the prisoner's hand. Every attempt to commit a crime is a misdemeanour at common law. In certain cases such an attempt has been made a felony by statute. The attempt consists in all cases of an intent to commit a crime, accompanied by an act in furtherance of, and evidencing the intent and forming part of, a series of executive acts which would constitute the actual commission of the crime if not interrupted. A single and merely preparatory act, not immediately and directly connected as one of a series with the act by which the crime is consummated, is not an act constituting the essential part of an attempt to commit a crime. The point at which such a series of acts begins has never been defined. It appears to be incapable of being defined, and ordinarily in charges of this kind it depends upon the circumstances of each particular case. The nature of the attempt and the acts by which alone the attempt can be carried into execution are narrowly defined by the law which makes the attempt to discharge loaded firearms with intent to murder a felony. The attempt forbidden is the discharge of loaded arms with intent to commit murder. The acts constituting the attempt are limited to the act of drawing the trigger or in any other manner attempting to discharge the loaded arms. These words of definition point clearly in our opinion to such acts only as are the proximate and immediately antecedent cause of the discharge of the arms. We are constrained to accept this view of the intention of the Legislature, which was adopted in the case of *Regina v. St. George*, 9 C. & P., p. 493, by very eminent judges, *Parke* B. and *Williams* J., and in the case of *Regina v. Lewis*, 9 C. & P., p. 523, by *Patteson* J. and *Arabin* Sergt., notwithstanding the doubts expressed by some of the judges in the more recent case of *Regina v. Brown*, 10 Q.B.D., p. 381. Sections 8 to 12 of the *Criminal Law and Practice Statute* 1864, headed "attempts to murder," are copied from the English act, 24 and 25 Vict., c. 100, sections 11 to 15. It has been truly observed (*Stephen's General View of the Criminal Law of England*, page 124) that on every one of these sections

more or less subtle questions arise similar to the one that has been raised in this case, all of which give chances of impunity to criminals; and the same learned writer has suggested that all these questions might be avoided by comprehending the whole of these sections about attempts to murder, in the words, "whoever shall attempt to commit murder shall be guilty of felony, &c." The suggestion is one that appears to deserve the consideration of the Legislature. But while the law remains as it is we entertain on doubt that the mere drawing of a loaded revolver from his pocket by the accused person is not an attempt to discharge that revolver at another person by drawing the trigger or in any other manner. The conviction must be quashed, and an entry will be made on the record that, in the judgment of this Court, the prisoner Andrew Grogan ought not to have been convicted.

Holroyd J.—I am of the same opinion. The fact of the prisoner taking the revolver out of his pocket might have been some evidence of intention of an attempt to discharge it: it was merely a preparatory act, and not an attempt to discharge it.

Kerferd J.—The prisoner, Andrew Grogan, was tried before me at Melbourne, on the 15th April, 1889, charged with an attempt to discharge loaded arms with intent to murder, under section 11 of the Criminal Law and Practice Statute. The presentment was as follows—Central Bailiwick, Colony of Victoria, to wit—The Attorney-General of our Lady the Queen presents that Andrew Grogan, at Hawthorn in the said bailiwick, on the twenty-sixth day of February in the year of our Lord one thousand eight hundred and eighty-nine feloniously did attempt to discharge certain loaded arms to wit a certain pistol loaded in the barrels with gunpowder and divers leaden bullets at and against one Robert Owens with intent in so doing, feloniously, wilfully, and of his malice aforethought to kill and murder the said Robert Owens." The evidence material to the issue was as follows:—The prisoner met the prosecutor, Sergeant Owens, at the corner of Glenferrie-road and Burwood-road. Sergeant Owens walked on for seven or eight yards past the prisoner when he heard a step behind him and felt a tap on his shoulder. On wheeling round he saw prisoner close up to him. As prisoner did not speak Sergeant Owens asked him "What do you want?" Prisoner said, "Did I ever do you any harm?" Sergeant Owens replied "No, who said so?" Prisoner then said "You have done me a great deal of harm; you have ruined me." Sergeant Owens turned half round to go away; as he did so he saw the prisoner move to follow him. Sergeant Owens said he then suspected mischief, and closed up to the prisoner. Prisoner drew back two or three paces and tried to put his hand into his right-hand trousers pocket, but failed to do so. Sergeant Owens again moved towards the prisoner, and saw him thrust his right hand into his trousers pocket and draw out a revolver. The moment Sergeant Owens saw the revolver in the prisoner's right hand, and before the prisoner had time to make any movement with his hand, he seized the prisoner's right hand with his right hand, and he swung the prisoner round and made him face about in front of him, with the prisoner's back towards him; in that position he pinioned prisoner's arm from behind. Prisoner had the revolver in his hand, Sergeant Owens holding the prisoner's hand, and pointing the revolver downwards. Prisoner struggled and dragged Sergeant Owens off the footpath on to the road. Sergeant Owens called "help me, as this man has firearms." Several persons, called as witnesses, came to his aid; they held the prisoner and one of them took the revolver from the prisoner's right hand. This revolver is called the "British Bulldog." Sergeant Owens afterwards arrested prisoner, and on searching him at the watchhouse a pin-fire revolver was found in his left-hand trousers pocket. Both revolvers were loaded, and some cartridges were found on prisoner which fitted the "British Bulldog" revolver. The jury found prisoner guilty, and he was remanded for sentence pending the decision of the Full Court. I reserved the question whether or not, on the state of facts given in evidence, there was any evidence to go to the jury in support of the presentment. The prisoner was presented by the Crown under section 11 of Act No. 233, which is a transcript (except as to penalty) of 24 and 25 Vic. C. 100. S. 14. Several cases have been decided involving the construction to be placed upon the English section, and in one of these cases, *Regina v. St. George*, 9 C. & P. 483; the facts were very similar to the facts in this case, but in the English case the attempt was carried further by the prisoner having his finger actually on the trigger of a loaded firearm, half cocked, which he presented and pushed against the trousers of the prosecutor, when he was prevented from discharging it. The case of *Regina v. St. George* was tried before Baron *Parke* on the Oxford Circuit 1840, upon an indictment for feloniously attempting to discharge loaded arms. Baron *Parke*, after consultation with *Williams, J.*, ruled that a person intending to shoot another, putting his finger on the trigger of a loaded pistol, but being prevented from pulling it, was not an attempt to discharge loaded arms by drawing a trigger, within the statute 1 Vic. c. 85, sec. 3 and 4, as the words "in any other manner," in that statute, mean something analogous to drawing the trigger, *e.g.*, applying a lighted match to a loaded matchlock gun, or striking the percussion cap of a percussion gun. I should have followed *Reg. v. St. George* in this case, if my attention had not been drawn to the case of *Reg. v. Brown* 10 Q.B.D. 381, in which, on a similar state of facts, all the judges, with the exception of Stephen, J., doubted the decision in *Reg. v. St. George*, and expressed opinions that it was desirable, on a fitting occasion, to reconsider that case. It appears to me that what we have to determine is narrowed down to the question whether *Reg. v. St. George* was rightly decided. The history of the legislation resulting in the enactment of section 11, Act 283, will, on examination, be found to throw some light on the proper construction to be placed on that section, and aid the Court in determining what was the intention of the Legislature. The language used in section

11, Act 233, as it now stands is by no means clear, but when it is read by the light of the repealed acts it becomes more intelligible, and it will be found that the present statutable provision is little more than a revival of the ancient common law. In Hawkin's *Pleas of the Crown*, seventh edition, vol. 1. p. 269, that learned writer says:—

"The ancient common law of England provided with such anxiety for the personal safety of the subject that every act done against another, which might in its consequence prove fatal to his existence, was construed to be felonious. In the reign of Edward IV., the maxim that 'voluntas reputabitur pro facto' began to grow obsolete, and this offence was considered as a high misdemeanour only punishable at discretion. But the daring outrages of certain persons soon after the accession of the present Royal Family, confederated in disguised habits under the appellation of the Blacks, made it necessary that the old law of England should, in some instances, be revived."

This state of things led to the enactment of 9 Geo. 1., c. 22. Under this act the offence of wilfully and maliciously shooting at any person in any dwelling place, or other place, was made a felony and punished by death. A new statutable offence was thus created, and it is described in Lecky's *History of England in the Eighteenth Century*, vol. 1. p. 488, as a special and most sanguinary law known as the Black Act, and found necessary for the suppression of offences of an audacious character. This new offence was amended and enlarged by the Statute 43, Geo. III., c. 58, which, after reciting that for various offences the provisions of the existing statutes had been found ineffectual, proceeds and enacts, "That if any person or persons, from and after the first day of July, in the year of our Lord 1803, shall, either in England or Ireland, wilfully, maliciously, and unlawfully shoot at any of His Majesty's subjects, or shall wilfully, maliciously, and unlawfully present, point, or level any kind of loaded fire-arms at any of His Majesty's subjects, and attempt by drawing a trigger or in any other manner, to discharge the same at or against his or their person or persons . . . . they shall be and are hereby declared to be felons, and shall suffer death, &c." It will be observed that the words "in any dwelling place or other place" contained in 9, George I., c. 22, are omitted, and that the words "or shall wilfully, maliciously and unlawfully present, point, or level any kind of loaded firearms at any of His Majesty's subjects" are added by 43, Geo. III., c 58 9, Geo. IV., c 31, repeals 43 Geo. III., c 58, and re-enacts by section 12 that if any person unlawfully and maliciously shall shoot at any person, or shall by drawing a trigger, or in any other manner, attempt to discharge any kind of loaded arms at any person . . . . shall suffer death as a felon," thus omitting the words "unlawfully present, point, or level any kind of loaded fire-arms at any of His Majesty's subjects." The reason for the omission of these words is not very apparent, unless they were considered unnecessary, being included in the attempt to discharge at "any of His Majesty's subjects," to do which the prisoner must "present, point, or level," the loaded firearm, and, being unnecessary, merely added to the difficulty in proving the offence. The Act 9, Geo. IV., C. 31, is important in the aspect that the Legislature was then reviewing the offence which had been created by statute of making it a felony to attempt to discharge any kind of loaded firearm, and it left unaltered the definition of the act, which should constitute that offence—namely "by drawing a trigger or in any other manner." 7 William IV., & 1 Vic. repeals 9, George IV., C 31, and by chapter 85, section 3, re enacts the same section, but makes the punishment transportation "beyond the seas for the term of his, or her, natural life, or for any term not less that 15 years, or to be imprisoned for any term not exceeding three years." Section 11, in our statute, is taken from 24 and 25 Vict., c. 100 s. 14, which repeals 7 William IV., & 1 Vic. c. 85, sec. 3, and is identical in the wording, except as to the penalty. The penalty under sec. 14 of 24 and 25 Vic. c 100, was penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years with or without hard labour, and with or without solitary confinement. The punishment under our section is imprisonment for a term not exceeding 15 years. At common law every attempt to commit a felony is a misdemeanour. Any overt act directly tending to the execution of the felony, and done with the intention of committing it, would, if the prisoner had the power of carrying his intention into execution, constitute at common law an attempt to commit a felony. The Legislature must, I think, be taken to have enacted the provisions of section 11 Act 233, with the full knowledge of the common law on the subject matter it was then dealing with, and, therefore, that it intended that the "attempt to discharge any kind of loaded firearms at any person," which it has constituted a felony, should be defined and restricted to the one act of actually drawing the trigger or "in any other manner" which according to the rules of construction would mean some act like the drawing a trigger. The rule that the definition of an offence in penal acts is to be construed strictly, would when applied to this section lead to the same conclusion. I would therefore say that *Regina v. St. George* was rightly decided. In this view there was no evidence to convict the prisoner, and the conviction should therefore be quashed.

Conviction quashed.

Solicitors for the Crown *the Crown Solicitor.*

(Before Higinbotham C.J., Williams and a'Beckett J.J.)

PINKERTON v. HEANEY.

30th July.

Local Government Act 1874 *(No.* 506) *s.s.* 399, 512, *and* 516 *--encroachment on road—prosecution for penalties under s.* 399—*The Municipal Council of the district or some person duly authorised by them are the only persons who can institute proceedings to recover penalties under this section.*

Application to make absolute an order *nisi* to review a decision of Justices dismissing an information on

which the informant sought to recover penalties from the defendant, under s. 399 of the *Local Government Act* 1874, for encroaching on a public road. The Justices gave their decision on the ground that the informant being neither the Municipal Council of the district, nor a person duly authorized by them, had no power to institute proceedings and their order was now sought to be reviewed on the ground, amongst others, that the informant as a member of the public had a right to institute proceedings.

Mr. McDermott to move the rule absolute.

Mr. Hood to show cause after stating the facts was stopped by the Court.

Mr. McDermott in support of the rule.

The informant is not suing for a penalty but is prosecuting the defendant for a breach of s. 399 part 2, of the *Local Government Act* 1874. The distinction between suing for a penalty and prosecuting is shown in *Reg. v. Duncan*, 7 Q.B.D. 198. The defendant has committed a breach of part 2 of sec. 399 and the informant is suing for that breach under his Common Law right to sue and not under Sec. 515 (Higinbotham C.J.—Does not sec. 516 stating to whom the penalty is to go point to the proper party to take proceedings for its recovery?) Not necessarily: the Justices in their discretion might award the informant the penalty. Cases like *Clarke v. Bradlaugh*, 8 App. Cas. 354, only apply when the informant seeks to enrich himself, and do not apply where the informant is prosecuting for a misdemeanour under his Common Law right. He also cited *Coakley v. Vicary*, 12 V.L.R. 132, *Tarry v. Newman*, 15 M. & W. 645 and *Reg. v. Hare ex parte Bush* 13 V.L.R. 71.

Mr. Hood in reply, by leave of the Court. The Municipal Council alone can sue: s. 515 only gives the justices jurisdiction when a penalty is to be recovered: s. 512 empowers them to take proceeding for any penalty: the penalties when recovered go in some cases to Revenue, in other cases to the Shire fund but never to a common informer, *Clarke v. Bradlaugh* decides that to enable a common informer to obtain an action for a penalty created by statute an interest in the penalty must be given him either expressly or by implication. He also referred to *Reg. v. Panton ex parte Schuh* 14 V.L.R. 529, *Boyce v. O'Hehir* 14 V.L.R. 532.

C. A. V.

Per Curiam.—This was an order to review a decision of justices dismissing an information for encroaching on a road in the Municipal District of the Shire of Bungaree and for continuing to do so on every day from that on which the encroachment commenced, on the 18th day of August 1888 till the 9th day of March 1889. The order has been applied for on several grounds the principal of which was that the informant was not the right prosecutor inasmuch as it was the Council who should have instituted proceedings for the offence. We think that the decision of the justices was right. The proceedings were taken under the 399th Section of the *Local Government Act* 1874, the second part of which section enacts "that every person who encroaches by making or causing to be made any building, hedge ditch, fence, hole, heap, or drain, on, across, or in any street or road, within any Municipal District shall for every such offence be liable to a penalty not exceeding £20 and for a further penalty not exceeding £5 per day for every day while the same is continued." The information was laid under that section and it was sought to recover the continuous penalty against the person encroaching. The justices held that the proceedings could not properly be taken by the informant under that section but that the information must be laid either by the Council of the Municipal Body or some person duly authorised by the Council. We think that view was the right one. The Act provides in sec. 516 that except where it is provided to the contrary "all penalties recovered for offences against this Act committed against the bye laws or regulations or in the Municipal district or in any way in respect of any Municipality shall be paid into the Municipal fund of such Municipality." By the same Act it is provided that the Council is to have the care and management of all roads within its municipal district. It has been held repeatedly in this Court that in such a case the body authorized to receive the penalty or some person authorised by them is the only person who can take proceedings for the commission of the offence for which the penalty is instituted. There are some cases at Common Law in which a common informer can if he has interest in the penalty and when not expressly or impliedly forbidden to do so proceed for its recovery, but in this case it is expressly declared that it is not a common informer who is to recover the penalty and it is hence to be implied that the local body alone can have authority to take proceedings for its recovery. It is unnecessary to consider the view that the informant as a member of the public could proceed for a misdemeanour at Common Law inasmuch as the prosecution was not of that character. There are means by which a member of the public can institute proceedings for a misdemeanour or felony these are sufficiently defined by law but these principles do not apply to a case like the present when the individual seeks to recover the penalty by means in addition to what he had at Common Law and not to punish the offence. The decision of the justices was therefore right and order to review must be discharged with costs.

Order nisi discharged with costs.

Solicitor for informant, *J. K. B. Plummer, for S. F. Mann.*

Solicitors for defendant, *Hughes & Permezel.*

(Before Higinbotham C.J., Holroyd and Kerferd, J.J.)

SANDHURST MUTUAL PERMANENT INVESTMENT AND BUILDING SOCIETY v. GISSING.

18 Sept.

Transfer of Land Statute sec. 49——"... *where the possession is not adverse to the interest of*

any tenant"—Meaning of words "interest of any tenant"—Negligence—Estoppel.

Appeal from the County Court Sandhurst.

The action was brought by the plaintiffs to eject the defendant from an allotment in Bakewell Street Sandhurst of which the plaintiffs are the registered proprietors. It was stated in the Appeal Case that one Esler sold the lands to Gissing on the 5th of January 1882 for L70; on the 18th January 1884 Esler gave the Crown grant of the Land to Gissing who was then in possession; on the 23rd of May 1884 Esler obtained a verdict against Gissing in the County Court for L52 3s. and to secure payment of this debt Gissing handed back the Crown grant to Esler; Gissing afterwards paid off the debt to Esler but never got back the Crown grant. Esler died in April 1887 and it was then discovered he had fraudulently mortgaged the land to the plaintiffs. The plaintiffs brought an action of ejectment against Gissing who pleaded that he was a tenant of the land at the time the mortgage was executed to the plaintiffs and therefore that the certificate of title which the plaintiffs obtained was subject to the defendants interest as a purchaser in possession. The learned County Court Judge gave a verdict for the defendant and the plaintiffs appealed.

Mr. Higgins for the plaintiffs appellants.

A man who for valuable consideration allows a friend to use his title for getting advances cannot afterwards urge as against the mortgagee that his friend had no power to mortgage it. The actual occupier cannot urge his equity if he has conduced to mislead the purchaser. The meaning of the words interest of any tenant in sec 49 of *The Transfer of Land Statute* means the interest of any tenant in his capacity as tenant *Calvert v. Pate* reported in the *Argus* 5th and 6th Sept. 1867. *Robertson v. Keith*, 1 V.R. (E) 11. He also cited *Cunningham v. Grundy* 2 V.L R. (E) 197 and *Munro v. Sutherland* 5 A.J.R. 139.

Mr. Topp with him *Dr. Quick* for defendant respondent.

Interest means all the interest. *Robertson v. Keith* includes in "interest" everything but a tenancy at will. *Colonial Bank v. Roche* 1 V.R. (L) 165 includes a tenancy at will and these two cases cover the whole ground. *Robertson v. Keith* has been approved of in the *Colonial Bank v. Babbage* 5 V.L.R. (L) 462 and followed in other cases. On a conveyancing point the Court will be slow to upset old decisions. As to the question of negligence the plaintiffs were grossly negligent in not enquiring into Gissing's title when they knew he was in possession of the land. Where the plaintiffs' negligence is the proximate cause of the injury they must suffer, *The Mayor, etc., of England v. Bank of England* 21 Q.B.D. 160. There was no duty on the defendant to get in his title deeds: no negligence arises where there is no duty. *Ettershank v. Zeal* 8 V.L.R. (E.) 333.

Mr. Higgins in reply.

Per Curiam.—This is an appeal from the judgment of the judge of the County Court at Sandhurst for the defendant in an action of ejectment. On October 19, 1885, the plaintiff society advanced a sum of £150 to one Esler, taking from him as security for repayment a transfer of the land in question, and giving him a deed of defeasance. On October 27, 1885, a certificate of title was issued to the plaintiff society. The defendant then was and had been from a date prior to January, 1882, in possession of the land. The land was Crown land when the defendant first entered on it. Esler subsequently obtained the Crown grant, and the defendant became his tenant. On January 5, 1882, the defendant agreed to buy the land from Esler for £70. He afterwards paid the purchase money in full, and obtained the Crown grant from Esler on January 18, 1884. On the following May Esler recovered a judgment against the defendant for the sum of £52 3s, and to secure payment of this debt the defendant gave back the Crown grant to Esler; it is alleged this money was subsequently paid but Esler retained possession of the Crown grant. Litigation, not resulting in a change of the relation between the vendor and the purchaser as to this land, followed between the parties, the defendant remaining in possession of the land, and claiming a return of the Crown grant, which he had given back to Esler in the course of their disputes, and specific performance of the contract of sale. Esler died on April 22, 1887. The question we have to determine turns upon the meaning of the words in the 49th. section of the Transfer of Land Statute. "The land which shall be included in any certificate of title shall be deemed to be subject. . . . where the possession is not adverse to the interest of any tenant of the land, notwithstanding the same may not be specially notified as an encumbrance on such certificate." It has been contended for the plaintiff company that the word "tenant" here means a lessee, that the object of this provision was to protect the interest of a person whose lease could not be registered under the statute as being for a term not exceeding three years (see section 75), and that such interest only of a tenant is protected as belongs to him in his capacity of lessee. An early decision, that of *Calvert v. Tate* (1867), A.R., August 8, followed by *Munro v. Sutherland* (1874), 5 A.J.R. p. 139, favour this limited construction. It is unnecessary for the purpose of deciding this case that we should either adopt or reject the suggestion made in the course of the argument, namely, that the word "tenant" in this place ought to be construed in the wide sense of any person who is the holder in actual possession, not adverse, of land brought under the operation of the act, and that the "interest" of such a person includes all rights in respect of the land either springing out of or accompanying such actual possession. But we think that the word "tenant" must be deemed to include at least every tenant who is in actual occupation and holds under some landlord, and that every interest in the land of such a tenant which grows out of and is not disseverable from his right to continue in occupation as a tenant is protected by the terms of this provision against the claim of a proprietor under a certificate of title. The more recent

decisions of this Court justify to this extent at all events a larger construction being placed upon these words than was allowed by the earlier cases. See *Robertson v. Keith* (1870) 1 V R. p. 11, decided by *Molesworth*, J.; *Cunningham v. Grundy* (1876) 2 V.L.R. (E), p 197, in which the same learned judge stated that he had reconsidered and that he retained the opinion he had expressed in the previous case; *Colonial Bank v. Babbage*, (1879) 5 V.L.R. (L), p. 462. Applying this meaning of the terms of the section, what was the "interest" of the defendant in this land on October 19, 1885, when Esler, his vendor, transferred the land to the plaintiff society? Having been let into or allowed to remain in possession under a contract for the sale of the land to him the defendant became at law tenant at will to his vendor, and he could not be ejected by his landlord without a previous demand of possession. He had at the same time an equity which would not allow his vendor to determine the tenancy at will except by converting it into the estate in fee simple. It is impossible in such a case to dissever the tenancy and the contract from one another. They together constitute, we think, an interest to which the land was subject, and which is entitled to prevail against the claim of the new proprietor under his certificate of title. It was further argued for the plaintiff that there had been such negligence or *laches* on the part of the defendant as should deprive him of his right under the statute. The learned judge who tried the case must be taken to have found that there was no such negligence or *laches*, and we concur in that opinion, particularly as the plaintiff society laid itself open by its conduct to the same charge. At the same time, we must not be understood in expressing this opinion to recognise it to be a principle of law that mere negligence could deprive a tenant of his statutory rights under section 49 of the *Transfer of Land Statute*. The appeal will be dismissed with costs.

Solicitors for appellant, *Wisewould Gibbs & Wisewould* for *Crabbe Cohen & Kirby*. Solicitors for respondent, *Braham & Pirani* for *Connelly & Tatchell*.

(Before Higinbotham, C. J., Holroyd and Kerferd, J. J.)

THE UNION FINANCE GUARANTEE AND INVESTMENT CO., LIMITED v. WOOLCOTT.

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20 Sept.

The Companies' Statute 1864 (*No* 190) *sec.* 16—*Notice of incorporation in the Government Gazette—Judicial notice of signature of Acting Registrar General.*

Appeal from the County Court, Melbourne.

The plaintiff Company sued the defendant for £375 due for calls and premium on 500 shares in the Company. The defendant paid into Court £125 for calls and contended that he was not liable for premium as he had never made any contract with the Company but only with the promoters and that a contract with the promoters would not be binding as between him and the Company: he also raised the point that there was no proof of the incorporation of the Company the only evidence being a notice of incorporation of the Company in the *Government Gazette* purporting to be signed by Henry Krone, Acting Registrar-General. His Honor the County Court Judge overruled these objections and gave a verdict for the amount claimed with costs and from this judgment the defendant appealed.

Mr. Hood with him *Mr. Bryant* for the appellant.

There was no proof that the Company had been duly registered: the only proof put in was a notice of incorporation in the *Government Gazette* purporting to be signed by the Acting Registrar-General. The Court will not take judicial notice of the signature of an Acting Registrar-General. Section 16 of the *Companies' Statute* provides that such notices shall be signed by the Registrar-General and as that section was passed to facilitate proof it must be strictly complied with. The *Evidence Statute* 1864 sec. 54 enacts that the Court will take judicial notice of the Assistant Registrar-General and the *Real Property Statute* 1864, sec. 215 deals with a Deputy Registrar General but an Acting Registrar-General is not provided for. The Court will not take judicial notice of the signature of the Deputy Registrar-General *Teague v. Farrell* 6 V.L.R. (L) 480. The payment of money into Court on account of the calls only admits the indebtedness for calls but does not admit any further liability or the defendants right to dispute the registration of the Company: *Harper v. Davis*, 19 Q.B.D. 170 *Hobson v. Stoneham* 13 V.L.R. 738 *Kelly v. Shire of Oakleigh* 9 A.L.T. 56 and *O'Hara v. Rochford* 11 V.L.R. 100. There was no contract between the defendant and the Company, the only contract being between the defendant and the promoters, and that would not be binding as between the defendant and the Company and there is no evidence of any fresh contract.

Mr. Isaacs with him *Mr. Irvine* for the respondants Company.

There is provision in the *Registration of Births etc. Statute* 1865 for the appointment of a person to act in the place of the Registrar-General and his signature as Acting Registrar-General is sufficient: he signs the registration as acting in the capacity of Registrar-General and his signature and appointment must be admitted till the contrary is proved: the fact that a doctor has acted as a health officer in a certain district is *primâ facie* evidence that he was at the time health officer of the district, *Reg. v. Hare exparte Newport*, 13 V.L.R. 318. Defendant is a shareholder of the Company and has paid calls and has kept the shares; he cannot blow hot and cold and now deny that there was any contract between him and the company; the learned judge below has found as a matter of fact that £125 was paid for premiums and the Court will not go behind that finding.

Mr. Bryant in reply.

Higinbotham, C. J.,—This action was brought to recover an instalment of a premium on each of 500

shares in the plaintiff company of which the defendant was alleged to be the holder, and L250 of two calls on each of the shares. The defendant relied on two grounds of defence. The first was that the company was not incorporated. If that defence was established it would be a clear answer to the action. The plaintiffs tendered in proof of the incorporation of the company a Gazette notice dated the 26th March 1888, and which purported to be a certificate that the plaintiff company had been on that day registered by the subscriber, Henry Krone, Acting Registrar-General. If that document constituted evidence that the Registrar-General had signed the certificate, it will be conclusive evidence not only of the incorporation of the company, but that all the requisites in reference to the registration of the company had been complied with. It was the duty of the Registrar-General to register the memorandum of the articles of association and to give a notification of that fact in the *Government Gazette*. The notification that was given in this case was objected to under the 16th section of the *Companies' Statute* 1864, and the 54th section of the *Evidence Statute*, on the ground that it did not purport to be signed by the officer required by the statute to sign it, namely, the Registrar-General, but it purported to be signed by "Henry Krone, Acting Registrar-General." It was contended, on the authority of a case decided some time ago, where it was held that the court could not admit a document signed by the "Deputy Registrar-General," that a document purporting to be signed by the "Acting Registrar-General" was not admissible. We do not think that that position could be supported. Where a person who appears to discharge a public duty does an act apparently in the discharge of that duty, and affixes his signature to the documents, it will be assumed that he fills the position which entitles him to discharge that duty. The Registrar-General had the duty imposed upon him by law of giving this certificate, and the certificate that had been given in evidence in this case would be conclusive but for the fact that the word "Acting" was prefixed to the words "Registrar-General" in his signature. We think that the word "Acting" did not affect the validity of the certificate. It merely indicated that for some reason the Registrar-General had for the time ceased to perform his duties, and that Henry Krone was for the time acting as Registrar-General, and discharged the duties of the office. We therefore think that the objection to the certificate of incorporation has not been established. The second objection was that there was no contract between the plaintiff company and the defendant. The evidence on that point shortly was that the defendant applied for the shares to brokers on the 15th March, 1888, and he received notice of allotment on the 19th March. The Company was not incorporated till the 22nd March and it is true any dealings between the defendant and the promoters of the Company prior to registration would not constitute an agreement binding on the defendant as between himself and the Company. Before the Company was incorporated and when the defendant applied for shares he made the application in a form relating to the terms of the prospectus of the promoters and one of these terms was that the shares offered by the promoters were to be offered at 10s. premium and the amounts payable on shares and premium were payable at certain times specified in the prospectus, those times so far as related to the premium being times to arrive after the incorporation of the Company. When the Company was incorporated the defendant proceeded to make payments, he paid L125 a month after the incorporation of the Company and another sum of L125 on the 22nd of May. This last payment of L125 was found by the learned judge to have been paid on account of premium and that finding is abundantly established by the form of the receipt "Received . . . . L125 being five shillings per "share the first instalment of ten shillings per share "premium on 500 shares . . . . ." Although it is so alleged the defendant cannot be heard to say he did not know what he paid for. Those acts of the defendant, after incorporation of the Company, deliberately done with full knowledge of the facts and in fulfilment of his promises to the promoters are strong evidence that he carried out his intention of making a binding contract between himself and the directors and that he became and still is a shareholder; he still maintains and asserts his rights as a shareholder but resists compliance with one of the terms of his registration, viz,—to take 500 shares on payment of a premium. We think that on all the grounds of appeal the defendant has failed and that the judgment below should be affirmed and the appeal dismissed with costs.

Holroyd J. I only wish to add a word in reference to the signature of Henry Krone as Acting Registrar, General. There is a statutory provision that in case of the illness or unavoidable absence of the Registrar-General, some one should be appointed to act as Registrar-General in his place. Seeing that Mr. Krone assumes to act as Registrar-General and it is not proved that he was not lawfully appointed or that he had taken on himself a duty which he was not duly authorised to perform, the presumption arises that he was duly acting as Registrar-General. If so, he came within the meaning of the words Registrar General in the 54th section of the *Evidence Statute*. He was Registrar-General *pro hac vice*, and judicial notice should be taken of his signature.

Kerferd, J. I concur and have nothing to add to what has already been said by the Court.

Appeal dismissed with costs.

Solicitors for appellant, *Woolcott* and *Baker*; solicitors for respondent *Braham* and *Pirani*.

(Before A'Beckett, J.)

RE THE PERCY LAND CO., LTD.

19th Sept.

Company—Rectification of Register—Issues—Motion Action. The Court will not, on motion, decide issues which are properly the subject of an action.

Motion on behalf of F. B. Bryant to have the register

of members of the above Company rectified by removing the name of the applicant therefrom as the holder of 100 shares therein on the ground of misrepresentation, and omission of material facts from the prospectus, whereby the applicant was induced to become a holder of the said shares.

Hayes appeared in support.

Hood, on behalf of the Company, took a preliminary objection: The Court could not conveniently decide the issues raised, by the affidavits in this application in an ordinary motion like the present. The applicant should proceed by action. The observations of *Kay, J.* are to that effect in the case of *Re the British Burmah Lead Co. Ltd.* (56 L.T. 815). The motion should be dismissed, costs to be cost in the cause. [*Per curiam.* The costs could not be made costs in the cause as there is no cause at present.]

Hayes: The matter can be disposed of on affidavit. Even assuming that it cannot be, the Court can direct an issue. There is no necessity for an action.

His Honor ordered that the motion should be adjourned until further order to admit of the applicant bringing an action; the defendant in the meanwhile not to enforce the payment of any calls; the plaintiff to bring the action within 14 days; costs of the motion to stand over until further order or until judgment. Liberty to apply.

Solicitors:—For applicant, *Fay*; for Company, *Cleverdon, Westley & Dale.*

SUPREME COURT SITTINGS.

(Before Hodges, J.,)

Stoddart v. Wood.

6th August.

Contract for the sale of land—Certificate of Title in vendor's own name.

One of the conditions in a contract for the sale of land was to the following effect:—"The certificate of title "to the property sold shall be produced to and a "copy thereof may be made by the purchaser &c." Held, that the expression "certificate of title" meant a certificate in the vendor's own name.

Action by John Stoddart against John Thomas Wood. The plaintiff claimed to have a contract for the sale of land rescinded and damage caused by the defendant's breach of contract. The contract was dated the 10th July 1888, and contained, amongst others, the following conditions:—(1) The purchaser shall pay a deposit in cash of L714 18s 6d. on the total amount of his purchase money, that is say, L200 on signing the contract, and L514 18s. 6d. in 14 days and also then give his promissory notes for the residue in equal amounts at 6, 12, and 18 months with interest at 6 per cent. per annum; (5) The certificate of title to the property sold shall be produced to, and a copy thereof may be made by the purchaser or his solicitors on application in that behalf to the vendor or his solicitor, and the purchaser shall within 14 days from the date hereof deliver to the vendor or his solicitor a statement in writing of all objections or requisitions (if any) to or on the title or concerning any matter appearing on the particulars or conditions. All objections or requisitions not included in such statement to be delivered within the time aforesaid shall be deemed absolutely waived by the purchaser and the purchaser shall be considered as having accepted title; (8) If the purchaser shall fail to comply with the above conditions or shall not pay the whole of the deposit aforesaid or shall not give the promissory notes aforesaid. . . his deposit money . . . shall be forfeited to the vendor who shall be at liberty without notice to rescind the contract and to resell the property. The plaintiff paid the deposit of L200 on the date of the contract, namely, 10th July 1888, on the same day, plaintiff's solicitor wrote to defendant's agent asking for inspection of the defendant's title, an appointment was made and on the 12th plaintiff's solicitor duly attended; but the only title produced for his inspection was a certificate in the name of one Richard Cooper. Thereupon plaintiff's solicitor wrote to the defendant to the effect that he required production of a certificate in the defendant's own name. A meeting was held on the 26th July, at which, however, no satisfactory arrangement was entered into; on the 8th August plaintiff's solicitor received a letter dated the 7th August, 1888, which came from defendants solicitor and was to the effect, that, the defendant had decided to cancel the contract and forfeit the deposit because the plaintiff had failed "to complete the matter according to the time agreed." The writ in the action was issued on the 29th August, 1888.

Topp, for the plaintiff, contended that the defendant was in default as he did not comply with condition 5; he should have produced a title in his own name; conditions 1 and 5 should be read together; the period of 14 days was mentioned in each evidently in order that the title should be produced before payment of the 2nd instalment.

Hood (*Skinner*, with him), contended that the certificate need not, necessarily, be in owner's name. *Johnstone v. Milling*, (16 Q.B.D. 460) cited.

His Honor:—The present action is brought to recover damages by reason of the defendant's breach of contract. The first breach complained of is the fact that he had no title to the land sold. The 5th condition says "A certificate of title "to the property sold shall be produced to and "a copy thereof may be made by the purchaser "or his solicitors on application in that behalf "to the vendor or his solicitors and the pur-"chaser shall . . . . . " Does that mean that the certificate must be in the vendor's name, or in any other person's name? If the certificate need not be in vendor's name, the latter part of the condition seems to be unmeaning, as there would be little use in asking a purchaser to make requisitions on another's title. I can apply the test in another way. Suppose

the term "certificate" struck out and "conveyance" substituted; the condition would not be satisfied by producing a conveyance to some other person than the vendor, and the purchaser could not make requisitions upon that. In my opinion this clause is substituted for the clause as to the delivery of an abstract. And as the abstract issued shows a title in the vendor, so the certificate should show a title in the vendor. I think therefore that the words mean a certificate of title in the vendor's name. Even if that were not so, in this case in my opinion it was the duty of the vendor within a reasonable time to produce some title in himself; up to the 24th July he had produced no title whatever. On the 26th July a meeting was held and at that meeting the plaintiff's adviser expressed his willingness that his client should take the place of the defendant in the purchase from Cooper and that the difference in price should be paid by his client, and his client was willing to carry out such an arrangement. An appointment was made for the 2nd August which defendant did not keep. He had visited his solicitor who had advised him to rescind and forfeit the deposit. He had no power to do so as he had not performed his own part of the contract. Judgment for the plaintiff with costs.

Solicitor for plaintiff, *F. S. Stephen, Junior*; for defendant, *Skinner*.

(Before Hodges, J.)

HASLETT v. LYNCH.

14, 16 August.

Will—Codicil—Construction—"right heirs"—next of kin—"Intestates Act 1864."

By his will dated 2nd April 1860 a testator devised certain real estate in a certain manner with remainder to his "right heirs." By a codicil dated 17th Feb. 1869, *he devised certain other real estate in a similar manner with remainder also to his "right heirs."*

Held that the words "right heirs" in the codicil pointed to the same person as the same words occurring in the will that is to the "heir at law" and not the "next of kin."

Originating summons adjourned into court.

The plaintiffs were Margaret Haslett, Michael Joseph Lynch and Mary Ann Quinlan and the defendants were William Francis Lynch, Francis Quinlan and Houston (administrator of Catherine Houston) the summons was taken out for the purpose of obtaining a declaration as to the persons who, according to the true construction of the will and codicil of one Michael Lynch deceased dated respectively the 2nd April 1860 and the 17th February 1869 were the "right heirs" of the said Michael Lynch. At his death the testator left surviving him all his children, namely, Margaret Haslett, (neé Lynch), Michael Joseph Lynch, Mary Ann Quinlan (neé Lynch), William Francis Lynch and Catherine Houston (neé Lynch), since deceased. By his will he made various dispositions of his property, which it is not material to this report to state; but by his codicil he appointed William Francis Lynch and Francis Quinlan executors and trustees, and after certain immaterial devises and bequests, he devised a piece of land known as "Vine Farm" to his trustees, to such uses and upon such trusts and subject to such powers provisions and declarations in favour of his daughter Margaret Lynch and her child or children as should correspond with and be similar to the uses trusts, etc., limited, and expressed by his will respecting certain property in Flinders Street in favour of his daughter Mary Anne and her child or children and with a corresponding remainder over, in default of issue in favour of testator's right heirs. On reference to the will it appeared that the testator had devised the above mentioned property in Flinders Street to trustees upon trust to permit his daughter Mary Ann to use etc., the said premises during her life . . . . and from and after her death upon trust for the child of his said daughter and the heirs of his or her body, if there should be only one, and if there should be more than one, upon trust for the children of his said daughter and the heirs of their respective bodies in equal shares as tenants in common . . . . . and in default of issue upon trust for the testator's right heirs for ever. The circumstances which rendered it necessary to apply to the court for the solution of the question stated at the head of this statement arose in the following manner:—No power of sale was given to the trustees by the testator, and Margaret Haslett being desirous of selling the above-mentioned "Vine Farm" was consequently compelled to present a petition to the court under the fifth part of the "*Real Property Statute*" for the purpose of obtaining an order for sale; Margaret Haslett was childless, and, as by the 95th section of the '*Real Property Statute*" it is necessary that all persons in existence having any beneficial estate or interest under or by virtue of the settlement should consent to the petition for sale, it consequently became necessary to determine who were the "right heirs" of the testator, that is, whether by those words the testator designated his next of kin or his heir-at law. It is to be observed that the "Intestates Act" came into operation on the 18th July 1864, that the will was dated 2nd April 1860 and the codicil 17th February 1869; the testator died on the 25th October 1871, his eldest son and heir-at-law being the defendant William Francis Lynch.

Neighbour, for the plaintiff, stated the facts. The expression "right heirs" was equivalent to next of kin. "Vine Farm" was devised by the codicil; the "*Intestates Act*" was passed before the execution of the codicil; that act altered the law of succession in Victoria. He referred to *Re Goodman's Trusts* 6 V.L.R. (E) 181.

Weigall, for the defendant John Houston;—Houston's interest is the same as that of the plaintiffs. The testator's meaning was that the property on his death should go as on an intestacy. The term 'heirs" does not always mean heirs in the strict

sense; *Jarman on Wills* (4th Ed.) ii. 79, 80, 81.

Anderson, for William Francis Lynch in his capacity as heir-at-law;—(1) The law of succession when land has been devised by a will has not been altered by "*The Intestates Act.*" (2) Even assuming that the "*Intestates Act*" does affect devised property, the heir-at-law would take as *persona designata*. The first proposition is proved by the preamble to the "*Intestates Act*" and by section 4. Moreover, the will was executed before the passing of the Act and the codicil directly refers to the will. Where a testator in a will which is regulated by the old law refers to a specific subject of bequest, he is considered as pointing to the state of facts in existence while he is penning the instrument and not at the time of his decease.

As to the meaning of the expression "right heirs;" *Re Dixon* (4 P.D. 81); *Garland v. Beverley* (9 C.D. 213, 220), "*Real Property Statute*" sections 6, 7 referred to.

Higgins (with him *Lorimer*) appeared for the trustees.

His Honor,—As this case has been very ably presented to me and as I think all the authorities have been cited I need not reserve any further consideration of it. The will was made before the passing of the "Intestates Act" and the codicil was made after that event; I have to determine the meaning of the words "right heirs" occurring in the codicil The same words occur also in the will. It is admitted that in the will the words in question point to the "heir-at-law;" and if the codicil had been made before the above mentioned act the meaning to be attributed to the words as they occur in the codicil would be the same as the meaning attributed to them in the will. The question, then, is whether I am to give to the words in the codicil a different meaning from the meaning given to them in the will, because the codicil has been made after the passing of the above mentioned act. In my opinion, determining in the meaning to be attributed to the words of any person I must consider the whole of the language of that person and I must give the same meaning to the same words wherever they occur in either of the two documents, and I feel no doubt that when the testator uses the words "right heirs" in the codicil he meant precisely the same persons as when he said "right heirs" in the will. It was urged by Mr. Neighbour on the authority of *Re Goodman's Trusts*, that the words should be construed in the codicil so that "the remainder" should go beneficially as real estate undisposed of should go, that is, to the next of kin. In the will, however, in that case the words were used by a person in an instrument which came into existence after the passing of the Act. It seems to me however, that this case is governed by *Garland v.Beverley*. In *Garland v. Beverley* the testator devised gavelkind lands for lives with remainder to his" right heirs," somewhat similar language being used in the will as in the present case. The argument rged here was used there viz.; that the words "right heirs" must mean the person to whom the property would go on an intestacy. In that case the property, if that interpretation had been put on the will, would have gone to the four sons; but the Court held that these words "right heirs" have a meaning and that the words meant according to the law of England "the heirs at common law;" and that although the land was gavel kind land which would not pass to the "heirs at common law" in case of an intestacy, still the land went under the devise to the "heir at common law." The Court treated the will as disposing of the property, and not as if there was an intestacy and were of opinion that the devise passed the property to the heir at law, although if these words had been omitted the property would have gone generally to the next of kin. If I, therefore, acceded to the argument put forward I should be giving no meaning to the words in the codicil, and I should be saying that the interpretation to be placed on the words in the codicil was to be different from the interpretation to be placed on the same words in the will. I, accordingly, decide that the words "right heirs" in the codicil mean "heir at law" and not "next of kin;" cost of all parties to be paid out of the general estate.

Solicitors—*Lynch McDonald Stillman & Keep*, and *C. E. Tovell*, and *Smith, Emmerton & Johnson*.

(Hodges, J.)

Re Thomas Walker.

22nd August.

"*Insolvency Statute*, 1871" *section* 37, *subsection V, section* 45—*technical objection—Computation of time.*

A "seizure" took place on the 1*st August, and a petition was presented on the* 13*th August. "No "act of insolvency" under subsection V of section* 37 *was committed inasmuch as the petition had not been presented "within* 12 *days" from the "seizure." Such an objection is not a technical one.*

Motion to make absolute an order *nisi* obtained for the sequestration of the estate of Thomas Walker. Objection was taken to the application on the ground that the order *nisi*, on its face, did not show that an "act of insolvency" had been committed. The "act of insolvency" alleged was that specified by section 37 subsection 5 of the "*Insolvency Statute*"; it appeared from the terms of the order *nisi* that a "seizure" had taken place on the 1st August and that the petition had been presented on the 13th of the same month. Notice of objections, on other grounds, had been filed, but owing to the views entertained by the Court in reference to the objection appearing on the face of the proceedings, it was deemed unnecessary to consider them.

Woolf, appeared in support of the order *nisi*.

Irvine, on behalf of the respondent;—No act of insolvency such as is contemplated by subsection V of section 37 has been committed as the petition has not been presented within 12 days from the seizure. As

regards the meaning to be attached to the phrase "within —— days" see;—*Glassington v. Rawlins*, (3 East 407; *Migotti v. Colville*, (4 C.P.D. 233) *R. v. O'Brien*, (6 V.L.R. 429.)

Woolf, in reply;—The objection taken is technical only and section 45 applies.

His Honor:—This is an application to make absolute an order *nisi*, and a preliminary objection is taken, that no act of insolvency is disclosed on the face of the order. This objection is based on subsection 5 of section 37 of the "Insolvency Statute" that subsection provides that an "Act of Insolvency" shall be committed when execution issued against the debtor on any legal process for the purpose of obtaining payment of not less than L50 has been levied by seizure; . . . . . provided a petition for sequestration be presented within 12 days from the seizure. It is to be noted that the petition must be presented within 12 days from seizure, not within 12 days from the day of seizure. The seizure was made on the 1st and the petition presented on the 13th. This according to the cases is within 12 days after the day of seizure but not within 12 days from the seizure, and as the petition is not presented within 12 days from the seizure there is no act of insolvency. The next question is one of costs, I will not grant costs, and for this reason. A notice has been filed stating an objection to the order *nisi* being made absolute. Although I do not now decide if the facts stated in that notice are well founded or without foundation, still, they are, of an extraordinary character. In addition the persons giving that notice might have included in it the objection on which the order is discharged. The petitioner in question, naturally, expects that the only objections he came to meet would be the objections on the notice. I cannot think, accordingly, that I ought to grant costs. If the matter stated in the notice be true, the respondent can be amply compensated in some other way.

Solicitors for petitioner, *Woolf* and *D'estrée*; for respondent, *Lamrock* and *Brown*.

(Hodges, J.)

In the Estate of Janet McMillan.

22nd August.

"Administration Act" 1872 (No 427) Sec. 28—Administration bond—Breach—Non filing three months' account—Assignment.

The word "may" occurring in the 28th Section of the "Administration Act 1872" is not mandatory. The mere fact of the non filing of the three months account is not per se, sufficient to induce the Court to exercise the power conferred upon it by the section.

Motion, on behalf of James Silas McMillan, one of the beneficiaries under the will of Janet McMillan, deceased, for an order that the bond entered into by Duncan McMillan, the administrator *de bonis non* of Janet McMillan and the National Insurance Company Limited, be assigned to James Silas McMillan for the purpose of putting the same in suit pursuance to section 28 of the "*Administration Act.*"

Janet McMillan died on the 3rd. November 1884, having by her last will dated the 5th. May 1884 devised and bequeathed all her real and personal estate to her husband, Peter McMillan, for life with remainder to the children of whom the applicant was one. Probate of the will was duly granted to Peter McMillan; he, however, died intestate on the 3rd. Feb. 1886, without having fully administered the trusts of the will. On the 15th. April, 1886, letters of administration *de bonis non* were granted to Duncan McMillan, another son of the testatrix; on the 18th. August 1886 the above-mentioned bond was entered into. In November 1887 Duncan McMillan, in his capacity of administrator, caused to be sold portion of the real estate devised by the will for the sum of £10,800. This money, less necessary deductions, was entrusted by Duncan McMillan to F. J. Bradly, a solicitor, who subsequently disappeared without giving an account of the money. It was further stated that no inventory of the goods etc., of Janet McMillan had been filed by the administrator.

Hayes, in support, stated the facts. He cited *Sandrey v. Michell* (3 B and S. 405); *Re Dean* (11 V.L.R. 761).

Weigall, to oppose; cited *Re Butlers* (9 A.L.T. 49).

His Honor:—This is an application by the persons interested in the estate of Janet McMillan to have the administration bond assigned under section 28 of the "*Administration Act*, 1872." By that section the court may on application and on being satisfied that the condition of a bond has been broken order the registrar to assign the same &c

The decision of his honor Mr. Justice Molesworth, in the case of "*In re Dean*" reported (11 V.L.R. 761) shows that the word "may" is discretionary and that the mere fact that there has been a breach will not necessarily give the applicant an absolute legal right to have the land assigned. The only breach that I am satisfied has been committed is the breach as to the filing of the accounts, I do not think that breach alone without any other reason is sufficient to justify me in granting the application. It would be if the other facts showed that these accounts were not filed with the view of concealing any breach of trust or if application had been made to the administrator and he had not then filed his accounts; but I do not think that the mere fact that he has not filed his accounts is sufficient to justify the court in acting under section 28. I do not mean to decide that before the application had been made there must have been an administration suit, or a decision of the court that there has been a breach, I only mean to decide that the court ought to be satisfied that there has been a breach and that the beneficiaries are or that they may be injured by that breach. I dismiss the application, without prejudice to any application that may be made on amended materials which may go to show that there has been

a breach in a substantial respect; costs against the applicants.

Solicitors: *Crisp & Cameron*, and *Malleson, England, & Stewart.*

IN CHAMBERS

(Before Williams J.)

DOWDY v. BENJAMIN.

21st Oct.

Rules of Supreme Court 1884, *Order XVI r.* 46—*This rule is not applicable to actions brought to recover damages for breach of covenants for title in conveyances of land.*

Application under Order XVI r. 46 on behalf of the plaintiff for the appointment of M. Benjamin the son of the defendant, who was dead, to represent his estate for the purposes of the action.

The plaintiff brought an action against B. Benjamin to recover damages for breach of covenants for title in a conveyance of land.

The defendant was a person of unsound mind and his son Mark Benjamin was appointed his guardian *ad litem*. After the pleadings were closed and the case set down for trial the defendant died, leaving a will whereby he appointed his son Mark Benjamin his executor; but no steps had been taken to obtain probate of the will, though some months had elapsed since the defendant's death.

Mr. Cussen in support. Plaintiff is entitled to an order directing M. Benjamin to be appointed to represent the estate of the deceased defendant for the purposes of the action, or in the alternative the plaintiff should be allowed to proceed without anyone being appointed; a note being made of M. Benjamin's objection to being appointed. The case of *Moore v. Morris*, L.R. 13 Eq. 140, is distinguishable from this as there the application was to dispense with a representative altogether.

HIS HONOR. Does not that case point to this, that the Rule is only applicable where the application is made in the interest of the estate?

Mr. Cussen. No, the words of the Rule are very wide and apply to all cases. Reference was made to *Collis v. Hector*, L.R. 19 Eq. 334 and to Daniell's Ch. Practice.

Mr. Irvine to oppose. This Rule is not applicable to cases of this kind. It is taken from the old *Chancery Procedure Act*, 15 and 16 Vict., c. 86, s. 44, and is limited to suits for administration and trusts and relates to friendly actions of that description refers to *Moore v. Morris*, (*ubi supra*) per Romilly M. R. [Here counsel was stopped.]

HIS HONOR said. I agree with the contention of Mr. Irvine I do not think that this Rule applies to cases of this description. Application dismissed with £3 3s. costs. I certify for counsel.

Solicitors for plaintiff, for M. Benjamin, *A. M. Williams.*

(Before Williams J.)

SANDER v. SUNDERCOMBE.

22nd Oct.

Rules of Supreme Court 1884, *Order XXIV r.* 2—*Application for leave to deliver a further defence after reply delivered should be made on summons supported by affidavit as to the truth of the matter sought to be pleaded and also as to when it arose.*

Application on behalf of the defendant under Order XXIV r. 2 for leave to deliver a further defence. The application was made *ex parte*, and after the delivery of the reply.

HIS HONOR. Under the *Common Law Procedure Statute*, the practice was to make applications of this nature by summons supported by an affidavit as to the truth of the matter sought to be pleaded and also as to when it arose. I think that procedure should still be adopted. The application must be made by summons unless the consent of the other side can be obtained.

Solicitors for the defendant, *McCutcheon & Bruce*

PROBATE JURISDICTION.

(Before Hodges J.)

IN THE WILL OF JOHN BROWN, DECEASED.

Aug. 23rd, Sept. 26th.

Practice Probate—Signature of testator in attestation clause—Affidavit of witnesses.

A testator signed his will in the attestation clause; one of the witnesses made an affidavit to the effect that the testator believed, that, in doing so, he was signing in the correct place.

Held that the affidavit should be made, unless there was some special reason, by both the witnesses, and that all the facts connected with the signing of the will by the testator should be stated and not the inference drawn by the witnesses from those facts.

Motion for probate of the will of John Brown deceased. The attestation clause of the will ran as follows: "Signed by the said John Brown and by "him declared to be his last will and testament in the "presence of us present at the same time who in his "presence at his request and in the presence of each "other have hereunto subscribed our names as "witnesses." It appeared that the words "John Brown" in the attestation clause had been written by the testator; the will was, otherwise, not executed by the testator. An affidavit was made by one of the attesting witnesses of which the material paragraph was as follows:—"(2) The said testator signed his "name in the attestation clause he being informed and "believing that it was the correct place for his sig- "nature."

Morrison, in support, stated the facts. He referred to section 8 of the "*Wills Act*," and cited *In the Will of McGregor* (6 A.L.T. 17): *In the Will of Gordon*

(10 V.L.R. (I.P.M.) 24): *In the Will of Coleman* (4 V.L.R. (I.P.M.) 22.)

His Honor:—One of the witnesses states in his affidavit that "the said testator signed his name in "the attestation clause he being informed and "believing that it was the correct place for his "signature." By the 8th section of the "*Wills Act*" it is provided that no will should be affected by the circumstance that the signature of the testator is placed among the words of the attestation clause; but although the section provides that the will shall not be deemed invalid because the signature is there, still the court is to be satisfied that the testator intented to give effect by such signature to the writing signed as his will and the court ought not to be satisfied that such was his intention unless the proper evidence is produced to prove that fact. The court is not to accept other people's inference but must, itself, be in possession of the facts from which other people draw that inference. The best evidence that can reasonably be got of these facts should be laid before the court, and, accordingly, the affidavit should be made by both the attesting witnesses unless there is some special reason for dispensing with it. This view is borne out by a decision of Molesworth J., *In the Will of Coleman*. In that case the testator signed in the attestation clause, and when the application was made Molesworth J. considered that the affidavit of one of the attesting witnesses was insufficient. This decision "*In the Will of Gordon*" was to the same effect, where, also, he said "I must have a further "affidavit to show how the witnesses arrived at the "conclusion that the signature was put in the attes-"tation clause by way of signing the will."

[The application was subsequently made to a'Beckett J., on the required materials, and granted.]

Proctors, *Sabelberg & Little.*

(Before A'Beckett, J.)

ROBERTSON v. FOX.

Sept. 20 26

Originating summons—Will—Construction.

A testator died having duly executed a will and a codicil; by the codicil it was provided as follows:—

"I also will and decree that the business of the farm "be carried on as usual until my youngest daughter, "Charlotte Lowry, attains the age of 18 years, and "all profits, if any, to be paid to my executors to be "deposited in a bank until my daughter Charlotte "attains the age of 18 years, and then all my real "and personal estate to be sold and divided as here-"inbefore mentioned; the profits, if any, to be "divided between my aforesaid daughters Annie, "Minnie, Elizabeth, and Charlotte Lowry. Also, "should any of my four daughters named above "marry and die without issue one half of hers or "their portion to be divided between the survivors and "the other half between my grand daughters Annie "and Jane for their sole use and benefit and in the "case of the death of one the said sum to be paid to "the survivor."

Held, that no one of the testator's daughters was entitled to receive her share in the residue until the day on which the testator's daughter, Charlotte, would, if living, attain the age of 18 years.

Originating summons taken out by James Robertson and Thomas Hussey, executors of the will and codicil of James Hamilton Lowry deceased against Annie Fox (*neè* Lowry) a daughter of the testator to obtain the opinion of the Court on a question of construction arising in the will and codicil of the testator.

[The question to be decided is stated in the judgment.]

Anderson appeared for the executors.

Irvine, for respondent, cited *Bubb v. Padwick.* (13 C. D. 517).

Cur. adv. vult.

His Honor:—An originating summons has been taken out to obtain the opinion of the Court on a question of construction arising on the will of John Hamilton Lowry. The codicil to the will contains the following provision:—"I also will and decree that the business of the farm be carried on as usual until my youngest daughter Charlotte Lowry, attains the age of 18 years, and all profits, if any, be paid to my executors to be deposited in a bank until my daughter Charlotte attains the age of 18 years, and then all my real and personal estate to be sold and divided as hereinbefore mentioned; the profits, if any, to be divided between my aforesaid daughters, Annie, Minnie, Elizabeth, and Charlotte Lowry. Also, should any of my four daughters named above marry and die without issue one half of hers or their portion be divided between the survivors, and the other half between my granddaughters Annie and Jane for their sole use and benefit, and in the case of the death of one of them the said sum to be paid to the survivor." The question is, what interests do the daughters take, and can the executors pay over a daughter's share on her coming of age without waiting until Charlotte attains the age of 18? This case has to be dealt with on its own peculiar language. I have looked to see what the testator meant, unaided by light from decided cases, and his intention seems to me sufficiently apparent. In his will he had bequeathed legacies which were given over in the event of the legatee dying before "the final execution of his will," by which I think he meant the actual distribution of his estate. So in the codicil, I think in referring to death and survivorship of legatees he is referring to the distribution of his estate, which he thereby defers until his daughter Charlotte attains the age of 18 years. Until that period no daughter acquires an absolute interest. By reason of the testator's debts and other circumstances of the estate the executors were obliged to sell at an earlier date, and the estate is in fact realised though Charlotte is not yet 15. The testator doubtless fixed the period of distribution having regard to the desirability of postponing sale,

and not from any desire that the legatees should wait for their shares until Charlotte attained 18; but the period of distribution having been distinctly defined and rights having been made dependent upon legatees surviving it, the Court is not at liberty to anticipate the period because the desire which led him to postpone distribution has been disappointed by an earlier sale. Declare that no one of the testators will become entitled to receive her share in the residue until the day on which the testator's daughter Charlotte, would, if living, attain the age of 18 years. That in the meantime the income of the share of any adult daughter should be paid to her, and that the trustees may apply the income of the share of any infant in the exercise of their discretion under section 77 of the Statute of Trusts 1864. Declare that the trustees of the will may invest such shares at their discretion in Government debentures or mortgage of real estate in Victoria. (It appears they have invested in bank deposit, which is probably a safe and advantageous mode of investment, but they must understand that this investment is made at their own risk as to the solvency of the bank, and that if the bank failed they would have to make good any loss.) Direct taxation of costs, trustees costs as between solicitor and client, and trustees to retain their costs and pay costs of defendant out of residuary estate.

Solicitors, *R. S. Anderson & Son.*

(Before a'Beckett, J.)

IN THE ESTATE OF J. B. CURRIE, DECEASED.

Sept. 26.

"Administration Act 1872" section 32"—Costs—The Court will not allow, under the above section, the costs of a rule nisi improperly obtained.

Motion for a grant of letters of administration of the estate of J.B. Currie deceased to a son of the intestate's father who resides in England. Administration had already been granted to the Curator.

[The facts appear in the judgment].

Hayes appeared for the applicant.

Weigall appeared for the Curator.

HIS HONOR said:—The curator of intestate estates obtained a rule to administer the estate of an intestate whose father, residing in England, was his sole next of kin. The father wrote to a son here asking him to administer to the estate if it should be necessary to do so. The son had no formal authority from his father, and prepared to apply for administration when it was not necessary for him to do so, inasmuch as the curator had already administered. The curator entered a caveat, and the son obtained a rule *nisi* to enforce his supposed right to take the estate out of the curator's hands, which would have subjected the estate to the cost of a double administration. On the return to the rule the son's claim to administration was wisely withdrawn, as the son had no interest in the estate, did not apply as attorney of the father, and the estate was in due course of administration. The sole question argued was that of costs, as to which the curator did not take up a hostile position, but left the Court to allow any costs it considered might reasonably be given out of the estate, under section 32 of The Administration Act 1872. The son might not have known of the curator's administration, and may have acted in supposed compliance with the wishes of his father, to whom the estate belonged, in preparing to apply, but when the curator entered a caveat his advisers should not have persisted with a misconceived application. I shall discharge the rule. The curator's costs to be taxed as between solicitor and client, and paid out of the estate, and the applicant's costs up to, but not inclusive of, the motion for the order *nisi* to be also taxed, and paid out of the estate. This is as far as I think the Court can go in the applicant's favour. If the father thinks that the subsequent proceedings were taken for his benefit, he might properly do what the Court cannot properly do, and indemnify the applicant against the expenses of the later steps in the proceeding, which cannot be heavy.

Proctors for applicant; *Taylor, Buckland* and *Gates.*

SUPREME COURT SITTINGS.

(Before A'Beckett, J.)

LAKE V. JONES.

Sept. 11, 13

Transfer of Land Statute (No. 301) section 49—Ejectment by registered proprietor—Adverse possession—The effect of the provision in section 49 as to adverse possession is to give to the person in possession the same rights as he would possess if he were assailed by a person having a good title at common law to the land with reference to which the action is brought.

Action by William Lake and Frederick Lake against John Jones to recover possession of certain lands and mesne profits since the year 1884. The facts are as follows:—In 1871 one Charles Blakey was the owner of the whole of Crown portion 18, in the parish of Warnacue, County of Mornington. In the same year he sold to the defendant a part of the said portion, 60 x 330, situate at the N.W. extremity of the said portion. Charles Blakey died in 1873, and probate of his will was duly granted to his executors. In July 1874, the executors sold to one Twycross another part of the said portion, comprising nearly all the remainder. Twycross sold to one White. White sold to the plaintiffs on the 12th. Sept. 1888. The defendant only obtained a certificate of title to the land bought by him in 1877; in the certificate issued to him, through a mistake, the land in his possession was described as being at the S.W. extremity of the Crown portion, instead of at the N.W., where it really was; owing to a similar mistake, the land set out in the certificate of title of the plaintiff's comprised the N.W. extremity of the Crown portion, which had been sold to the defendant in 1871. The defendant was a

fisherman and has lived for many years in the vicinity of the land which he had bought; immediately on purchasing the land he had cleared the timber in an effectual manner, and did other acts evidencing an intention to take possession. In 1884 he built a store upon the land and went to live there. No intrusion upon his rights had been attempted by any person since the year 1871. The plaintiffs based their claim upon their legal title; the defendant relied on the doctrines of "mutual mistake" and "adverse possession."

Neighbour for the plaintiffs, cited *Staughton v. Brown* (1 V.L.R. (L) 150); *Grave v. Wharton*, (5 V.L.R. (L) 97); *Chisholm v. Copper* (6 W.W. and A'B. (L) 225; the "*Transfer of Land Statute*" secs. 47, 49, and 50 were relied on.

Weigall, for the defendant, contended that the case was governed by *Sutherland v. Peel* (1 W.W. & A'B. 18); he also relied on Part II of the "*Real Property Statute*," and sec. 49 of the "*Transfer of Land Statute*."

Cur. ad. vult.

His Honor:—In this case the facts are supported by evidence which I have no reason to distrust, and which is absolutely uncontradicted. In the year 1871 the defendant bought a small piece of land for the sum of £4 from the then registered proprietor, Richard Blakey. The fact that the land was then sold, although the actual receipt is not forthcoming is corroborated by the evidence of other persons who bought small subdivisions at the same time and at the same price from the same person. And it is further corroborated by the production of an authority from Blakey himself to the present defendant authorising him to sell certain allotments. The evidence is also distinct and uncontradicted and is perfectly trustworthy as to the position of this allotment and shows that what the then registered proprietor intended to sell and what the present defendant intended to buy was the piece of land as to which this action is brought. It also appears by the evidence that by a mistake originating, apparently, in the Titles Office, there was an error made on the certificate as to the road which formed one part of the boundary, and when the defendant applied to the executors of Blakey for a title, the certificate was issued to another piece of land and not to that which the defendant had bought. And the same mistake occurred as regards the other purchasers. These persons thought they had certificates of title which they had not; that being so, the land they had bought passed by transfers on the register of title of the whole block including the land they occupied. Nobody seems to have been aware of this until recently when Mr. White who desired to sell and who had all along recognised the rights of the people who were in possession, discovered by an accident that the title was in him. Mr. White had recognised that the defendant had a title to the allotment which was in his possession, a former proprietor of the land desired to buy it. Mr. White never supposed that he had any claim against the persons in possession till he discovered that his certificate of title covered their land when he thought he could do them an injury and himself a benefit by trafficking on their misfortune so he sold the land to a speculator who bought his interest for what it was worth and took his chance of turning out the rightful occupier, that is, rightful in a moral sense whether legally so or not I have to determine. We are not here concerned with the question of morality apart from the law. I refer to Mr. White's dishonesty by reason of section 47 of *The Transfer of Land Statute*, which provides that a person who buys from the registered proprietor is not to be conceived to inquire as to how the registered proprietor obtained his title, except in the case of fraud. The conduct of the speculator in buying the interest under the circumstances was not as I think a fraud within the meaning of the section although his conduct indicates a low moral perception. I have then to consider whether the title of the registered proprietor is not affected by another qualification, namely, adverse possession. The provision in section 49 as to adverse possession, is, as I have always understood it and has been held by the Court, to give the person in possession the same rights as he would have possessed if he was assailed by a person having good title at common law by deed of the land with reference to which the action was brought. I have therefore to consider whether there have been such acts of possession by the defendant in this case as to entitle him to the protection of that qualification. That involves a question of fact. Then again I have evidence which is not at variance with the probabilities and which I believe. It is the evidence of the defendant confirmed by the evidence of his neighbours and is absolutely uncontradicted. In 1871 the man who bought the land went on it, and in exercise of the rights which he supposed he possessed, and, not as a trespasser, cut down timber and cleared the whole of his land. I quite admit that the mere casual cutting of a log is not such an assertion of title as would be at all satisfactory evidence to establish title by adverse possession. But here is a person who has a small well defined area to which he supposes he has rights and on which he exercises his rights. It was not an indefinite area; it was a small allotment of which only one side was left open, on one side was his neighbour's fence and on the others government roads, and the defendant said that from that area he removed the timber. He was taking it from land which he believed to be his. Such an act was much the same as if he had ploughed it: an open assertion and exercise of proprietary rights. He was living near the land. He did nothing more with reference to it till 5 or 6 years ago when he built a store and fenced the ground. There had been no intrusion on the land by anybody else in the interval. Can I then treat the possession actually taken at the more recent period as connected with the possession in 1871? I think the taking possession in 1871 followed by residence near the land and by going into actual possession at a later period, there being no intrusion in the meanwhile, sufficient to enable me to hold that the defend-

ant was the true legal owner in the interval that he has therefore been in possession since 1871 and that this adverse possession by him is good against the plaintiff's title under his certificate. It has been held by two judges of this court in the case of *May v. Martin* (11 V.L.R. 562) that discontinuance of possession of land by the rightful owner for 15 years bars him of his right to recover possession against a trespasser at any subsequent period. They held that it was enough if the right man was out of possession. From that view the Chief Justice dissented and the Privy Council agreed with the opinion of the Chief Justice in the case of *The Trustees &c. Co. v. Short* (13 App. Cas 793). The head note to that case is as follows :—"The English Limitation Act (384 Will 4. c. 27) . . . . does not "continue to run against the rightful owners of land "after an intruder has relinquished possession with- "out acquiring title under the Act Possession so aban- "doned leaves the rightful owner in the same position "in all respects as he was before the intrusion took place. "The Act applies not to want of possession by the "plaintiff, but to cases when he has been out of and "another in possession for the prescribed time." This is a case which might have been cited as an authority in favour of the plaintiff, but I do not think that that authority is in conflict with the view I take. At p. 798 Lord Macnaghten says :—"Their Lordships are "of opinion that if a person enters upon the land of "another and holds possession for a time and then "without having acquired title under the statute, "abandons possession, the rightful owner on the "abandonment, is in the same position in all respects "as he was before the intrusion took place. There is "no one against whom he can bring an action. He "cannot make an entry upon himself. There is no "positive enactment, nor is there any principle of law, "which requires him to do any act, to issue any "notice or to perform any ceremony in order to "rehabilitate himself. No new departure is necessary. "The possession of the intruder ineffectual for the "purpose of transferring title cases upon its abandon- "ment to be effectual for any purpose. It does not "leave behind it any cloud on the title of the rightful "owner, or any secret process at work for the possible "benefit in time to come of some casual interloper or "lucky vagrant."

It has been pointed out by Mr. Weigall that in this case there has been no suggestion of abandonment by the defendant and consequently the observations in the case do not apply. With reference to the question of fact, there is an expression of opinion in the case of *Grave v. Wharton* (5 V.L.R. (L) 97-100) in the judgment of the Chief Justice which is appropriate to this case. The Chief Justice said "It was con- "tended that a short interval of absence, say, for the sake "of argument, a few minutes, would not destroy the "continuity of occupation, difficult questions, "might, no doubt, arise in such cases as to whether "the person in possession left with an intention of "returning. It would be a question of fact, *quo* "*animo* the person left, whether *animo revertendi* and "an inference might under the circumstances be "drawn in favour of continuity of occupation. No "such circumstances existed in this case. I think "the rule must be discharged." Here there was a clear *animus revertendi*. The man intended to return and eventually did return. Therefore I think there has been a continuous possession by the person which is made by the *Transfer of Land Statute* adverse to the rightful owner. There has been no entry by any other person and therefore there has been a complete continuance of possession on the subject of the plaintiff being too late to bring the action. I have considered the Act No. 873. I consider that the clearing of the land by the defendant in 1871 was "actual possession" within the meaning of section 1 and that time began to run against the plaintiff's predecessor in title from the time when the defendant then took possession. I give judgment for defendant with costs.

Solicitors, for plaintiff, *Talbot*; for defendant, *Grant* and *Son*.

(Before a'Beckett, J.)

MAC VEAN v. WOOLCOTT.

Sept, 18, 20, 23, 30.

Contract for the sale of land—Concealed vendor.

Where a vendor admits that he solicited purchasers to buy, and that they bought on his advice without making further inquiry, it is necessary for him to satisfy the court that he made the purchasers fully aware of the fact that he was a vendor and brought his double position plainly before them.

[*Compare Ballantyne v. Raphael (11 ALT 34.)*]

Action by Donald Mac Vean, R. C. Anderson and W. Jamieson against W. J. Woolcott and Arthur Garner to obtain rescission of a contract for the sale of land situate in Lonsdale St. Melbourne.

[The facts appear in the judgment.]

Higgins (*Isaacs* with him), for the plaintiffs, opened the case.

Dr. Madden (*Weigall* with him) appeared for the defendants.

Higgins in reply. The onus lies on the vendor to show that he communicated the fact that he was the vendor to the purchaser; *Erlanger v. The New Sombrero etc., Co.* (3 App. Cas. 1218); *Dunne v. English* (L. R. 18 Eq. 524); *Ballantyne v. Raphael* (11 A.L.T. 34); *Redgrave v. Hurd* (20 C.D. 1); *Smith v. Chadwick* (20 C.D. 27) were also relied on.

Cur adv. vult.

HIS HONOR :—The three plaintiffs became members of a syndicate for the purchase of land in Lonsdale street for £16,000. The defendants, Woolcott and Garner, were the vendors. The syndicate was in 16 shares of £1,000. The vendors retained six shares, and each of the plaintiffs took one. The statement of claim alleges that the plaintiffs took shares, relying upon the false statement of the defendant Woolcott

that "he was a mere purchaser of the land with the other members of the syndicate, and that all the members of the syndicate were taking an interest in the said land on the same terms and at the same price as himself." The misrepresentation alleged is on a matter which the law considers material. To use the language of Hodges, J., in the case of *Ballantyne v. Raphael*, recently decided in this court, and reported at 11 A.L.T. 34: "If a man had knowledge and belief in another, considering that other a shrewd, capable business man, it would be most natural for the former to feel that he could put his money into any venture in which the latter was a co-adventurer, provided he was in the venture on the same footing as the latter. A representation therefore that the latter was one of the purchasers might be a material misrepresentation." The present case turns upon the question of fact whether such misrepresentation was or was not made. Each of the plaintiffs swears that it was made to him in a conversation with Woolcott alone. Woolcott denies that it was made to any of them. It was not disputed that each of them was induced to join the syndicate upon the solicitation of Woolcott, and that each agreed to join in the course of a conversation with him. The plaintiffs say that they bought because in this conversation Woolcott told them that he was buying with them, and invited them to go into the speculation on the same terms as himself; that trusting to his judgment they did not exercise their own; and that they were afterwards surprised to find that Woolcott was himself interested as a vendor. Woolcott swears that he told them exactly how matters stood; that he and Garner were vendors of the property as well as purchasers, taking six shares in the syndicate. In this conflict of evidence each side has appealed to the probabilities of the case in support of its contention. It appears to me highly improbable that the plaintiffs should have placed such faith in Woolcott as to buy a share in his property at his solicitation at his own price, without making any independent inquiry, or without even obtaining from his lips any particulars as to the property which would have enabled them to form an idea as to the value of what they were buying, yet, according to Woolcott they so bought. This is the cardinal difficulty in accepting his version. The other facts of the case are in his favour. There was no concealment of the vendors' interest by putting the title in the names of trustees for the vendors. The certificate of title stood in the names of Woolcott and Garner, and the dealings by which they had acquired the property were undisguised. The plaintiffs were summoned to the meeting of the syndicate, and at the first meeting (at which one of them was present, though it is not proved that he was present throughout) the title to the property and the expediency of placing it in trustees was openly discussed, so that those not already informed must have then learnt who were the vendors. I rejected evidence tendered by the defendants to show information given to other members of the syndicate before they joined. The slightest inquiry by any of the plaintiffs would have given them the names of the vendors. It seems strange that Woolcott, dealing with old acquaintances, experienced in the wiles of sharebrokers and land sellers, should have ventured upon misrepresentation, which a single question might have unmasked, and which must have been ultimately discovered. Perhaps it may be explained by his supposition that the concealment of his interest could be laughed off as something done every day, excusable in recommending a really good thing, as he might then have believed the venture to be. Coming now to the direct evidence of the conversations, on which the plaintiffs' case is based, held 12 months before the action was tried, two in the street and one at the drinking bar of a theatre, I do not accept without reservation the version of either side as to exact words used. Each witness attempting to reproduce what he said and the other said, though not consciously untruthful, would be driven to shape the dialogue to bring out the result left on his mind, which he might remember distinctly, though not remembering distinctly all which produced it. There was, however, one expression used by the plaintiff Anderson, and remembered by Mr. Woolcott, which deserves consideration. Anderson says he asked Woolcott, "Am I coming in on the ground floor?" and was answered "Yes." It seems that "coming in on the ground floor" means coming in on the same level with originating speculators in the same concern, and Mr. Anderson's question sought information upon the very matter which he and his co-plaintiffs say was misrepresented. Woolcott admits he answered yes, but explains this by saying that Anderson asked if he was on the ground floor with the other nine buyers, not on the ground floor with Woolcott and Garner, the two sellers. This is difficult to believe. It would have been little satisfaction to Anderson to know that Woolcott was selling to him on no worse terms than to others, but it would have been considerable inducement to know that he was coming in as a buyer on the same terms as Woolcott, whose advice he could trust on the ground floor but not if given from another story. Woolcott has the misfortune to be contradicted by three witnesses, whose position and manner of giving evidence were as good as his own. The case of *Dunne v. English*, 18 Equity, 524, was cited to show that if I felt doubt I should find against Woolcott, as the onus of proof was on him. Without going to this extent as to the onus of proof, I think that where a vendor admits that he solicited purchasers to buy, and that they bought on his advice without inquiring, it is necessary for him to satisfy the Court that he made the purchasers fully aware of the fact that he was a vendor, and brought his double position plainly before them. I have no doubt that Woolcott did not do this, and that the impression left on the minds of the plaintiffs was that which they state Deciding in favor of the plaintiffs on the facts, I am prepared to give relief of the same kind as that which was given in the case of *Ballantyne v. Raphael* leaving the innocent co-adventurers the right to hold the plaintiffs liable as members of the syndicate, but

ordering the responsible defendants to repay them what they have already paid, and to indemnify them against anything they may have to pay hereafter as members of the syndicate. I have dealt with the case so far as between the plaintiffs and the defendant Woolcott. There is no imputation upon the defendant Garner, whose conduct appears to have been straightforward throughout. It is sought to make him answerable for the misrepresentations of his co-vendor, by reason of the relation subsisting between them, as appearing by the pleadings. The statement of claim alleges, and the defence admits, that the defendant Woolcott promoted and formed a syndicate for the purpose of purchasing the land belonging to himself and the defendant Garner, and that this syndicate was promoted and formed with the authority of the defendant Garner. The evidence shows that Woolcott acting on behalf of himself and Garner, procured by misrepresentation money and promissory notes, which came under the control of both defendants, and I hold both bound to return the money, and to indemnify against the notes so procured. It happens that the remedy would be probably efficacious if given against Woolcott alone, but I must deal with the case as if Woolcott were worth nothing, and then, unless the judgment were against Garner as well as Woolcott, the former might retain advantages gained by his partner's misrepresentation, in promoting a syndicate with his authority, and the persons deceived would have nothing but a barren judgment against Woolcott. Both defendants join in one defence, denying the misrepresentation, and I cannot distinguish between them as to costs. I have now to notice a matter occurring after the plaintiffs had joined the syndicate, which has been urged as a ground for refusing them relief. It appears that after they had joined, the syndicate resolved to purchase a property adjoining that first purchased, and that the plaintiffs have made payments in respect of their contributions to this second purchase. Though the second purchase grew out of the first, they have not sought to escape from their liabilities in respect of the second purchase. The defendants have not specifically set up this second purchase as a ground for refusing relief or for modifying the relief sought in respect of the first purchase. I allowed them to give evidence on the subject in support of the allegation in paragraph 9 of the defence, that "the plaintiffs, with knowledge of the facts, altered the defendants' position by dealing with the purchased property," and otherwise. If it had been specifically set up the plaintiffs would have specifically offered by their reply to give up their interest, and I should not have regarded the second purchase as any answer to the action. The plaintiffs have offered at the bar to give up their interest on the return of their money, and I shall give the defendants an option to avail themselves of this offer. If the option be not exercised rights may be difficult of adjustment as between the plaintiffs and the other persons interested in the second purchase. The Court has not been asked to adjust these rights, and could not adjust them in this action, and all I need now say upon the subject is that the possible difficulty with which the plaintiffs may have to contend is no reason for refusing them what they ask on the present pleadings. The difficulty as regards the defendants is met by the plaintiffs' offer to give up the property. The order which I propose to make is as follows, but I will hear the plaintiffs as to any modification which they may desire:—Order that the defendants (Woolcott and Garner) repay to each of the plaintiffs the amounts paid by him as his contribution to the purchase of the land in the statement of claim mentioned, and repay any sum which he may hereafter have to pay upon any promissory note given by him in respect of such contribution, the said defendants to repay the sums already paid within 14 days from this date—that is to say, to the plaintiff Donald M'Vean, £ : to the plaintiff William Jamieson, £ ; to the plaintiff R. C. Anderson, £ . (If amounts not admitted, reference to chief clerk to inquire.) The liability of the defendants as to any future payments which plaintiffs may have to make to be enforced if necessary by order to be made upon motion in this action. On each of the plaintiffs being repaid the sums already paid, and discharged from liability as to future payment, he is to sign any document which the defendants may require for the purpose of assigning to them his interest in the land in the statement of claim mentioned. In the meantime, the defendants Garner and Woolcott to be at liberty to exercise all rights which the plaintiffs could have exercised as members of the syndicate. Refer to tax plaintiffs' costs, and defendants Woolcott and Garner to pay such costs when taxed. The plaintiffs offering to give up their respective interests in the property adjoining the property in the statement of claim mentioned, order that each of them, on application by the defendants within one month from this date and payment of the amount of their contributions and indemnity against future liability in respect of such purchase, do assign to the defendants his interest in such adjoining land. Liberty to apply.

Solicitors, for plaintiff, *Tuthill, Geoghegan* and *Perry*; for defendants, *Woolcott* and *Baker*.

(Before Holroyd J.)

RE CHARLES BLUME.

Oct. 17th

Insolvency Statute 1871 *sec* 49—*Discharge of order nisi—Appearance.*

A respondent is entitled to have his costs of applying to discharge an order nisi although notice of intention to abandon the proceeding may have been served by the petitioner on the respondent.

Application to have an order *nisi* obtained for the sequestration of the estate of Charles Blume discharged with costs. The "act of insolvency" on which the order *nisi* was based was that specified in subsection VIII of section 37 of the "Insolvency Statute." It subsequently transpired that previous to obtaining

the order *nisi* the judgment creditor has assigned the judgment, and as the petitioner was advised that, in consequence, a valid objection might be taken on that ground to the order being made absolute, he served notice on the respondent of his intention not to proceed further.

Neighbour for the respondent :—The order should be discharged and with costs.

Cussen for the petitioner :—The respondent has notice of the intention to abandon these proceedings and no costs should be allowed

Neighbour in reply:—The respondent must appear in order to have the order "discharged" otherwise the order would be simply "struck out" and might be afterwards revived. He referred to section 49 of the "Insolvency Statute" and to the form of the order *nisi*.

His Honor :—This is an application by the respondent to have the order discharged ; he is entitled to come here to have it discharged and he is also entitled to obtain his costs.

Solicitors for petitioner *Hart & Benjamin* ; for respondent *Oldham & Chambers*.

SITTINGS IN BANCO.

(Before Higinbotham, C.J., Holroyd, and Kerferd, J.J.)

Avery v. Byrne.

25 Sept.

Justices of the Peace Statute 1887—*Complaint for injuries to a fence under the Criminal Law and Practice Statute* 1864 *sec.* 178—*Question of title—Jurisdiction of justices ousted.*

This was an application to move absolute an order *nisi* to review a decision of the justices at Box Hill, dismissing a complaint on the ground that a question of title being involved, they had no jurisdiction. The defendant was charged under Act No. 233 sec. 178, with having unlawfully and maliciously cut down a fence, the property of the complainant. It appeared from the affidavits that on the case being opened the defendant's solicitor objected to the jurisdiction of the justices, on the ground that a question of title was involved, the complainant being only in adverse possession of the land where the fence was cut down, but he called no evidence to support his objection. The complainant was then examined and said that he claimed possession of the land where the fence was cut down, and in reply to the Chairman of the Bench stated that he had no title to the land but paid the rates. The magistrates then held that as a question of title was involved they had no jurisdiction to hear the case, and struck it out. The order *nisi* to review this decision was obtained on the ground that the justices had jurisdiction to hear and determine the complaint and should have heard and determined it.

Mr. Donovan, with him *Mr. Woinarski*, moved the rule absolute.

Mr. Barrett to show cause. Sec. 23 of the Amending Act No. 399 is to be read with s. 178 of the Principal Act. The magistrates were satisfied that a claim of title was involved, and therefore their jurisdiction was ousted at Common Law, and it then lay on the complainants to show that they had jurisdiction by Statute, *Mack v. Murray*, (5 V.L.R. (L.) 142). It lies on the complainant to negative the exceptions within the section, *Sanderson v. Fotheringham*, 10 V L.R. (L.) 17, following *O'Shea v. D'Arcy*, 6 V.L.R. (L.) 142. The complaint itself must show a claim to the property injured jointly in the complainant and defendant otherwise the section does not apply, *Williams v. Clausen*, 6 V.L.R., (L.) 19 ; *Daniell v. Rowbotham*, 9 V.L.R. (L.) 215. In any case the costs should abide the event.

Mr. Woinarski in support. The mere suggestion of a claim of title without any evidence in support is not sufficient to oust the jurisdiction of the magistrates, *Bunday v. Fuller*, 9 Ex. 140. This complaint does not come under the proviso, as no question of joint ownership arises, the complainant denies that the defendant has any title at all. The justices must satisfy themselves of the *bona fides* of the defendant's belief in his claim before their jurisdiction is ousted, *Reg. v. Morrison, exparte Crichton*, 2 V.L.R., (L.) 144. In *Clausen v. Williams*, the Court held that the Justices must go into the claim. He also cited *White v. Feast*, L.R. 7 Q.B. 353 ; *Reg. v. Reid ex parte Brennan* 4 V.L.R. (L.) 163 ; *Reg. v. Walker, ex parte Kennedy*, 4 V.L.R. (L.) 452. C.A.V.

30th Sept.

Higinbotham C. J.,—This is an order calling on justices sitting in the Court of Petty Sessions, at Box Hill, and on the defendant, to show cause why the justices should not be ordered to hear and determine an information laid by the informant Avery against the defendant. The information charged the defendant under section 178 of the *Criminal Law and Practice Statute* 1864 with having, on the 3rd April, 1889, unlawfully and maliciously cut down a fence, the property of the informant. At the hearing the solicitor for the defendant raised the objection that the case was one in which a question of title was involved and the justices struck out the case as one which they had no jurisdiction to hear. By the *Criminal Law and Practice Amendment Statute* 1871, section 23, it was directed that the 178th section of the principal statute should be read together with the following proviso :—"Provided that no claim of right or title shall oust the jurisdiction of the said justices, but the said justices may and shall inquire into the whole circumstances of the case, and may convict any person offending, notwithstanding that such person claims to be, or is in fact, jointly interested with some other person in the property alleged to have been injured." The effect of this proviso, which is admittedly obscure and difficult to determine, was held in *Williams v. Clausen* 6 V.L.R. (L.) p. 29 to be that in a case within the section the jurisdiction of the justices is ousted by a *bona-fide* claim of title only where someone claims to be or is in fact, jointly interested

with some other person in the property alleged to have been injured. This case was doubtingly followed in the subsequent case of *Daniel v. Rowbotham*, 9 V.L.R. (L) p. 245; and as we are not prepared to hold that those decisions were erroneous, we are bound to give effect to them. The defendant in the present case set up no claim of joint interest with the informant in the fence which the defendant was charged with cutting down and the justices therefore had to deal with the charge without reference to the proviso. Admitting this, the counsel for the informant has contended that the justices erroneously stopped the inquiry before they had the means of satisfying themselves of the *bona fides* of the claim of title set up by the defendant. The mere assertion of claim of title by a defendant undoubtedly does not deprive justices of their jurisdiction. It is the duty of justices to proceed with and hear a case, notwithstanding an intimation of the intention of any party to raise this objection to their jurisdiction until they are satisfied that the nature of the claim of title set up is *bona fide* and real. We think that the justices sufficiently fulfilled their duty in this case. The defendant's solicitor at the outset informed the justices that the informant was only in adverse possession of the land, and that the defendant also claimed possession. The informant was then called, and without questioning the statement already made for the defendant, he admitted in answer to the chairman of the bench, that he himself had no title, but that he was in possession of the land and had paid rates on it. It became apparent at this stage of the case that each of the parties claimed to be in actual possession of the land, and that there was real and *bona fide* difference between them as to their respective rights to the land founded upon alleged possession, which the Court was not competent to determine. The justices were satisfied that their jurisdiction was ousted. We think that they had heard sufficient evidence to warrant them in coming to that conclusion, and that they were right in deciding that they should not further proceed with the hearing. The order to review has been granted on the ground that the justices had jurisdiction to hear and determine the information. We are of opinion that under the circumstances disclosed by the evidence they had no jurisdiction, and that the order should be discharged, with costs.

KERFERD, J.—I concur in the judgment of the Court which has just been delivered. I rest my judgment on the ground that I am of opinion that the magistrates had sufficient evidence before them to justify them in the conclusion they reached. I desire to say a word or two with regard to the proper construction to be placed upon Section 178 of the *Criminal Law and Practice Statute* 1864 as amended by section 23 of the Act No. 399. If the case cited, of *Williams v. Clausen* (6 V.L.R., (L) 29), had come before the Bench as now constituted I should have felt considerable difficulty in agreeing with the decision in it as to the proper construction to be placed upon that section. I am of opinion that what the Legislature intended by section 178, as amended by section 23, was that any person doing the act therein constituted an offence, should not be permitted, when summoned for that offence before magistrates, to stop the hearing of the case by making a claim of right or title to the land and that when such a claim was made the magiistrates should, notwithstanding, proceed with the case, and inquire into the whole case before arriving at a decision on the claim made. There is no doubt that the addition of the proviso in section 23 has rendered the meaning of the whole section obscure. Where the language used in a section of an act of Parliament is of ambiguous meaning, and the proper construction to be placed upon the section doubtful, and such construction has been the subject for an authoritative decision I should hesitate in overruling it. The fact that another view of the proper construction has been taken in a judgment of the Full Court upon a section of doubtful meaning would in itself, to those familiar with the difficulty of drafting an act of Parliament and of expressing therein what was intended in language which shall convey neither more nor less than that intention, be a substantial ground for hesitation in arriving at the conclusion that that view was erroneous.

Order to review discharged with costs.

Solicitors for complainant *Wisewould, Gibbs and Wisewould*; solicitors for defendant *Taylor & Russell.*

(Before Higinbotham C.J. Holroyd and Kerferd J.J.)

HANLEY v. MCMASTERS.

13th Sept.

Marriage and Matrimonial Causes Statute 1864 (*No.* 268) *s.s.* 35 *and* 36—*proceedings before justices against putative father for support of illegitimate child—although the uncorroborated oath of the mother is insufficient in bastardy cases the paternity of the child may be proved without the mother's evidence.*

Application to make absolute an order *nisi* to review a decision of justices at Daylesford. It appeared from the affidavits that the defendant was apprehended on a warrant and brought before the justices to show cause why he should not support his illegitimate child. The proceedings were taken by John Hanley the father of the child's mother who it was alleged died in Melbourne some years ago but no proof of that fact was given before the justices. To prove the paternity of the child two previous orders for maintenance, one on the information of the mother and the other on the information of one Ross, were put in evidence in each of which it was recited that the justices was satisfied on the oath of the mother and other corroborative evidence that the defendant was the father of the child: these orders were objected to on the gronnd that they were bad as fixing a definite period during which maintenance was to be paid and on the further ground that they were not made between the parties to the present proceedings:

it was also contended that the justices could make no order without having the mother called as a witness. The Bench overruled the objections and made an order for maintenance at the rate of 10 shillings a week: this order was now sought to be reviewed by the defendants on the ground of objection taken before the justices.

Dr. Madden to move the rule absolute.

Mr. Isaacs to show cause. The mother's evidence is not indispensable. The case of *Reg. v. Armitage* L.R. 7 Q.B. 773 which is relied on for the other side is decided under the English Acts. Under the English *Bastardy Acts* then in force the mother's evidence was necessary and the mother could alone make the complaint. The Victorian Act is much wider; under the 35th section of the *Marriage and Matrimonial Causes Act* (1864) "any reputable person" can make the complaint: section 36 which requires corroboration of the mother's oath does not mean that the mother's evidence cannot be dispensed with altogether; the paternity of the child can be proved in any way like any other fact in a civil proceeding; the Act merely says the mother's testimony alone will be insufficient. Although the previous orders might have been set aside they are good till they have been set aside and they afford ample evidence of paternity. The previous orders and the present one are substantially between the same parties; the proceedings in each case were taken for the benefit of the child and they are a *res judicata* between the defendant and the child.

Dr. Madden in support. Under section 30 the party lodging the complaint is the party to the action: the previous orders cannot affect the present complainant who was no party to them. Taylor on Evidence 7th Ed. page 1436. *Outram v. Morewood*, 3 East 365, *Case v. Reeve* 14 John, N. 4. R. 78, *Sheddon v. Patrick* 2 Sw. & Tr. 176 *Hathaway v. Barrow* 1 Camp. 151 and *Smith v. Rummen* 1 Camp. 9. The mother is a necessary witness and must be called. *Phillips v. Tomlinson* 2 W.W. & a'B, (L) 82 *Queen v. McCormack ex parte* Brennan 4 V.L.R. (L.) 36. The mother's evidence is the best evidence and the law checks it and says it must be corroborated: if the contention of the other side be correct we would have the singular result that the best evidence must be corroborated and inferior evidence need not. An Act of Parliament must be interpreted the same way for all purposes and if the mother's evidence were necessary if she were alive it cannot be dispensed with even though she is dead.

C.A.V.

30th Sep.

HIGINBOTHAM, C.J.—Order to review an order of justices requiring the defendant to pay 10s. a week for the maintenance of his illegitimate child. Honorah Hanley gave birth to an illegitimate child in September, 1876. On November 10, 1876, upon the complaint on oath of George Ross, an order was made by justices in the Court of Petty Sessions at Daylesford against the defendant as the father of the illegitimate child, for leaving it without adequate means of support. The mother and the defendant both appeared before the justices on that occasion, and the defendant was ordered to pay 5s. a week to the clerk of Petty Sessions for 12 calendar months. That order was bad, as fixing a definite period during which maintenance was to be paid, and it might have been set aside, *Regina v. Smith*, 9 V.L.R. (L.). p. 112. There was evidence that the defendant paid the amount ordered for 12 months. On December 4, 1887, the mother, Honorah Hanley, made another complaint on oath against the defendant, who did not appear, and a second order for the payment of 5s. a week was made by the Court of Petty Sessions at Daylesford for another period of 12 calendar months. The defendant appears to have made payments under this order for a short time, and he then went to New Zealand, where he remained for 11 years. During that time the mother, Honorah Hanley, died, and her child was maintained by her father, who now brought this complaint against the defendant on his return, from New Zealand, charging him with having deserted his illegitimate female child on March 5, 1889. The justices made an order in proper form without fixing a limit to the time during which the order should run, for payment by the defendant of ten shillings a week. The first question we have to determine is whether such an order for the maintenance of an illegitimate child can be made by justices without the evidence of the mother herself. It has been contended for the defendant that he is entitled as of right to have the mother of the child called to be cross-examined on his behalf, and that failing her appearance no order can lawfully be made against him. A proceeding for maintenance is in the nature of a civil suit. *Reg. v. Collins*,7 V.L.R. (L.), p. 74. No rule of law requires a particular witness to be called in support of a civil claim. If the right now insisted upon exists, it must be given by the statute which creates the jurisdiction in cases of this nature. *Reg. v. Armitage*, L.R. 7, Q.B., p. 773, which was cited in aid of this alleged right of the defendant, was decided upon the terms of the English Bastardy Acts then in force. It was provided by 7 and 8 Vict., c. 101, sec. 2; that an order might be made upon the application of the mother. By section 3 the justices were required to hear the evidence of the woman and such other evidence as she might produce, and also the evidence tendered by or on behalf of the person alleged to be the father, "and if the evidence of the mother be corroborated in some material particular by other testimony to the satisfaction of the said justices, they may adjudge the man to be the putative father of such bastard child." These provisions were extended by 8 and 9 Vict., c. 10, section 6, to the hearing of an appeal against the order to the General Quarter Sessions of the peace. By these acts, the giving of evidence by the mother, who alone is authorised to lay the complaint (7 and 8 Vict., c, 101, sec, 2), and the corroboration of that evidence are made conditions of the jurisdiction of justices in both courts. The Victorian enactment on this subject,

The Marriage and Matrimonial Causes Statute, 1864, Part III., sections 30-42, appears to pay more regard to the interests of the illegitimate child than the English acts abovementioned. Under our law "any reputable person," as well as the mother, may make complaint on oath against the father. The paternity of the child is one of the essential elements of proof in all cases, and in the majority of cases of a first application for an order for maintenance this fact can only be established by the evidence of the mother where the defendant appears to answer the complaint by a denial of the fact. But neither the evidence of the mother nor the corroboration of her evidence in a material particular by other testimony is expressly required by the law of Victoria as a condition of the jurisdiction of justices. The words of section 36 are: —"No man shall be taken to be the father of an illegitimate child upon the oath of the mother only," that is to say, if the mother's testimony has to be depended on in proceedings taken by herself or by another person on behalf of the child, her oath alone will be insufficient. But she need not be called as a witness at all, or, if called, she need not be corroborated, if without her sworn testimony, or independently of it, there be evidence proper and sufficient to satisfy the justices that the defendant is the father of the child. As our law does not require that the oath of the mother shall be given at all, either by sworn complaint or at the hearing, the first ground of this order has not been, in our opinion, sustained. The second ground of the order is that there was no legal evidence whatever before the Court of Petty Sessions that the defendant was the father of the child. The two previous orders of justices in petty sessions were received in evidence nothwithstanding objection taken for the defendant. They were bad, and might have been quashed or appealed from by the defendant. But they still remain unappealed against and unrescinded, and though their operation has long expired, they are existing records or official minutes of proceedings of a Court of Petty Sessions, and are the best evidence of adjudications of a competent tribunal on a particular matter then in dispute, namely, the paternity of this illegitimate child. It has been argued that the parties to the present proceedings and to the two earlier applications are not the same parties. But we think they are. In complaints under part III., that illegitimate children are left without adequate means of support, the children and the alleged father are the real parties. The mother or a reputable person makes complaint on oath on their behalf. In any subsequent application the children and the alleged father remain the same parties, and the original order fixing the paternity of the defendant being still unrescinded is evidence that may be legally used to estop the defendant from denying the fact, and is sufficient upon identification of the defendant to supersede further or other proof of the fact. The decisions upon the English Bastardy Acts are in accordance with this view. The dismissal of an application by the mother is not a bar to a second application by her, as no appeal lies from such a refusal, and not one of the facts which together constituted the merits of the application appears to have been found and determined by the justices. *Regina v. Machen and another*, 13 Q. B., p. 74: *Regina v. Gaunt and another* L. R. 2 Q. B. p. 466. But where in appeal to Quarter Sessions an order of affiliation is quashed on the special ground of the insufficiency of the corroborative evidence as required by the English acts, the order of Quarter Sessions is final and binding upon both parties. *Regina v. Glynne*, L.R. 7 Q. B., p 16. We are of opinion that the order to review has not been supported upon either of its two grounds, and it will be dismissed with costs.

HOLROYD, J.—I concur in the judgment of the Court, but not entirely for the reasons given. The fact of the paternity of this child was proved in a proceeding before the justices, in which an order was made against the alleged father which might have been quashed. Whether it was quashed or not, still the fact was still adjudicated upon, and it was an adjudication *inter partes*: the child was a party on one side and the alleged father was a party on the other. When evidence was given on the application with which we are dealing that this fact had been found in a previous proceeding before a competent court that operated by way of estoppel, and prevented the alleged father from requiring that further evidence of the fact should be adduced. If there had been no such adjudication, I should have thought that the objection that the mother was not called was a good one. It appeared in the proceedings before this Court that the alleged father had stated that the mother had died some years previously. That evidence was not given before the justices; there was no evidence before them that the mother was dead. In my opinion the mother's evidence was the best obtainable evidence, and unless it appeared that she was dead or that her evidence could not be obtained, no other evidence could be substituted for hers. There is a general rule of law that the best evidence if obtainable must be produced, and no inferior evidence can be substituted, and the origin of this rule is that the absence of the best evidence raises the presumption that it is being purposely suppressed. That was modified in some cases by statute, but generally the rule should be rigidly adhered to. In cases of this kind it was impossible for any human being but the mother to know who the father was. And her evidence ought to be produced, unless as in this case there was an estoppel against the alleged father denying that he was the father. The 36th. section of the *Marriage and Matrimonial Causes Statute* does not require in so many words that the mother should be called to give evidence, but take it for granted that she would.

KERFERD, J.—I am entirely of the same opinion. I say that there being an adjudication of the fact of paternity while it remains recorded that fact remains a *res judicata* between the parties. In this case the orders as drawn up being both bad does not touch on the fact adjudicated on and are admissible to prove that fact in any court of law. That fact having been previously adjudicated upon, the evidence of the

mother was not necessary in the proceedings they were now considering. I do not say that her evidence could be dispensed with if that fact had not been determined by adjudication. By section 37 of the Marriage and Matrimonial Causes Statute it was provided that the mother might also be ordered to contribute to the maintenance of the child, and the justices might fairly insist on the mother being before the Court to be examined.

Order to review dismissed with costs.

Solicitor for the complainant, *Geake*; Solicitors for the defendant, *Gaunson & Wallace.*

(Before Higinbotham, C.J., Holroyd & Kerferd, J.J.)

IN RE ROBERTSONS, MINORS.

11 Sep.

Habeas corpus by testamentary guardians for the custody of infants—The Court will not interfere with the rights of a testamentary guardian or supersede him in the exercise of his functions, unless it be satisfied that he acted in so improper a manner or placed himself in such a position as to imperatively require in the interests of the children in some essential particulars that he should be superseded in the exercise of his office.

Appeal from an order in Chambers of *Williams*, J., refusing a *habeas corpus* for the delivery up of infants to the custody of the testamentary guardian. The facts of the case are fully set out in the judgment of the learned Chief Justice.

Dr. Madden and *Mr. Higgins* for the appellants.

The learned primary judge decided this application on the merits as though it was a claim between two rival candidates for the legal guardianship of the children. Here there is a testamentary guardian appointed, and he has the right to the custody of the children: to refuse this order is practically to supersede the testamentary guardian: in the affidavits there is no imputation on the conduct of the testamentary guardian, and the Court will not supersede him except in extreme cases—for actual misconduct or immorality or the prospect of bad treatment. In the course of their arguments they referred to *Chambers on Infants*, p.p. 64 & 163; *in re Andrews*, L.R. 8 Q.B. 58; *in re Sanders* 6 V.L.R. (L) 10; *in re Johnson*, 8 V.L.R. E. 811; *Foster v. Denny*, 2 Ch. Cases 237; *in re Fynn*, 2 D. G. & S. 457; *in re Carter*, 28 L.J. Ch. 458; *Andrews v. Salt*, L. R. 8 C.P. 637; *Lyons v. Blankin*, Jacobs Reports.

Mr. Topp and *Mr. Coldham* for the respondents.

The Court will consider under all the circumstances of the case in whose custody it would be most beneficial the children should be. In this case the learned judge below has found that it would be in their interest to remain in the custody of their stepfather, and the affidavits fully warrant this finding. Besides, this arrangement carries out the mother's wishes and that is a circumstance to be looked to. The testamentary guardian lives out of the jurisdiction, and the Court will appoint someone within the jurisdiction as guardian over whom it can exercise control. The following cases were referred to:—*Stuart v. Bute*, 9 H.L.C. 443; *Johnston v. Beatty*, 10 C. & F. 122; *In re Ethel Rowe*, 51 L.T. 793; *Wellesley v. Duke of Beaufort per Lord Eldon*, 2 Russell at page 18; *In re Agar Ellis*, 24 Ch. D. 317.

Dr. Madden, in reply, referred to *Simpson on Infants*, 423; *re Johnston*, 2 Jones & Lat. 222; *re Goode*, 1 Ir. Ch. Rep, 256; *Beatty v. Johnstone*, 1 Phillips 17; *re Lewis*, 2 Molloy, 485.

HIGINBOTHAM, C.J.—This was an appeal from a decision of Mr. Justice *Williams*, refusing to make an order on the return to a writ of *habeas corpus* for the removing of two children, Elsie Margaret Robertson and Victoria Jean Robertson, from the custody of their stepfather, Mr. Agar Wynne, and delivering them to the custody of their testamentary guardian, Mr. John Richmond Smith. The writ of *habeas corpus* was directed to Mr. Agar Wynne, and in opposition to the writ he relied upon a number of affidavits, which were directed to show that he was a most proper and fit guardian and custodian of these children, and that they should be allowed to remain in his care. If this had been an application to the Court for the appointment originally of a guardian of these children these affidavits would be sufficient to show that Mr. Wynne was undoubtedly a fit and proper and very desirable person to whom the custody of these children might be safely committed; and upon a reference to the master in accordance with the ordinary practice of the Court for the settlement of a plan for the care, maintenance, and education of the children, the affidavits presented by Mr. Wynne ought to have, and no doubt would have, due and great effect. Mr. Wynne was the husband of the mother of these infants. Their father was Mr. John Robertson, who died on the 13th February, 1885. A little more than a year afterwards—namely, in November, 1886—Mr. Wynne married the mother, the widow of Mr. John Robertson. From that time till her death in April of the present year Mr. Wynne discharged the duties which devolved upon him as stepfather of the children (who were living with their mother), which he was called on to discharge. It seemed that he gained their affection and confidence, that he was a man possessed of ample means, and that he used his means freely for the care, education, comfort, and advantage of these children as well as of his own child, which he had by the same mother. These circumstances all presented a case in which, on a further and different application, Mr. Wynne's claim would be entitled to high consideration. The only detraction from these claims was to be found in the statements advanced by Mr. Wynne himself. In his affidavit he imputed on no adequate grounds, a motive of personal malice by the testamentary guardian. He also insinuated (for he did not distinctly state it) a charge of dishonesty against the testamentary guardian and his brother, Mr. Robert Smith. That charge was made without any apparent foundation. It had been answered, apparently satisfactorily,

by the answering affidavits. No regard appeared to have been attached to it by the learned judge who dealt with the application, and in the argument before this Court no reliance was placed on the charge. It was a charge which should never have been brought. In answer to these affidavits, the testamentary guardian had furnished affidavits in support of his claim as testamentary guardian to the custody of these children. He adduced certain facts which showed that in the exercise of the trust reposed in him he had been, up to the present time, free from all imputation of misconduct. Until the death of the mother it was the view of all the parties that these infants might be safely and properly committed to her care. Immediately after her death Mr. Smith gave attention to the duty which then was imposed on him. He called to his advice the members of the family, and he proposed a scheme to them for the care and custody of these children. It appeared to have obtained the unanimous approval of the greater number of the members of the family, and upon that family determination of this scheme he founded a demand against Mr. Wynne to deliver these children. Upon the refusal by Mr. Wynne to accede to the demand he took out the present writ. The testamentary guardian had gone beyond adducing proof that he had not unfitted himself for the duties of his position as guardian. He adduced reasons to show that there might be objections to the scheme which was ultimately approved of by Mr. Wynne for the custody of the children. That scheme was that Mr. Wynne should invite to his house a lady on account of the infants (Mrs. Peter Robertson), that she should live in his house, and take charge of the children. Mrs. Peter Robertson had made an affidavit in which she stated that she was separated from her husband under painful circumstances which she mentioned. She had been living in a house by herself with two infant children, and to carry out this scheme of Mr. Wynne's would involve, so far as the scheme had been unfolded to the Court, her depriving her own children of a mother's care, and also involve the residence of this young lady (who was separated from her husband) in the house of Mr. Wynne. That objection had been, with commendably proper delicacy, presented to the Court, and it was an objection which they could not fail to see might justly weigh with the relatives of these infants. It involved no imputation on Mrs. Peter Robertson, but it was one which might naturally create alarm and uneasiness in the minds of the relatives of the infants, and might constitute very valid and reasonable grounds of objection to the scheme proposed by Mr. Wynne. The facts as disclosed upon these affidavits came before the learned judge, and they appeared to have been dealt with by him on the basis of a consideration of their respective and relative merits. The learned judge admitted the fact that the testamentary guardian, Mr. Smith, had a legal right to the custody of the children, but notwithstanding that he considered that he was at liberty to consider whether it was or was not for the interest, advantage, health, happiness and comfort of the children that they should remain where they were, with Mr. Wynne. And if the Court were called on to consider the question which the learned judge presented to his own mind as the question to be determined I should be indisposed to come to a different opinion from him. The objection taken by the testamentary guardian to Mr. Wynne's proposal was one which might be cured. It might be, on a review of the whole of the facts, and having regard to the position and means of Mr. Wynne and Mr. Smith, that it would be, on the whole, more conducive to the interest, health and education of the children that they should remain with Mr. Wynne. I do not express any opinion on that subject, but I may say that I would be slow to come to an opinion adverse to that at which the learned judge had arrived at on a review of the facts. The Court however is of opinion that the learned judge in dealing with the question in this aspect was in error in not recognising the equitable as well as the legal rights of the testamentary guardian, and that he had arrived at a decision which could not be supported, inasmuch as it departed from the established rules of the court in dealing with applications like the one before him. The position of a testamentary guardian is a very peculiar one. He derives his appointment from the will of the testator; he derives his authority and duties from an act of Parliament. It is doubtful, to say the least, whether the Court has jurisdiction to remove him from his position,, which it is undoubtedly his right to hold till reasons are adduced to supersede him in the exercise of that office, and to appoint another person to perform the duties of guardian in his place. The Court would, when the question is submitted to it in a proper form, never refuse to consider whether he was or was not a fit and proper person, or whether he was or was not in such a position as would enable him to discharge his duties as guardian for the benefit of the children. But the Court in dealing with cases of that kind acts on entirely different principles from those on which it acts when an application is made to it to appoint a guardian originally for an infant. The principles on which the Court acts in such a case have been clearly stated. This Court acts now in the same way as a court of equity would. It is no longer a court of equity. It is a court exercising civil jurisdiction; but in dealing with questions relating to the care and custody of children who are under the care of the Court, the principles which regulated courts of equity regulate the proceedings of this Court. The rules which regulated courts of equity in dealing with these cases were stated in several cases. In *Beattie v. Johnson*, 1 Phillips, 17, it was decided by Lord Cottenham that although the Court will sometimes appoint a guardian to an infant without a reference to the master. where no objection is made to the individual proposed it will in no case dispense with a reference where the guardianship is contested between two parties" as appeared to be the case as regarded these infants. And the Court said in reference to the circumstances of that case :—

"Then these gentlemen come before the Court and say this

order has been made in error because we are testamentary guardians—four out of eight who were named. Now if that be the fact, a very different view of the case is presented to the Court, for although the Court has the power of interfering in certain cases with testamentary guardians it proceeds on very different rules and principles from those which regulate its conduct where the discretion of appointing guardians devolves upon it in the first instance. And on the supposition that these persons are testamentary guardians the order now appealed from is clearly erroneous, because in that case the Court had no right to appoint four out of eight, nor had it any jurisdiction on that sort of application to appoint guardians at all."

The particular grounds upon which an application to supersede a testamentary guardian and to appoint another person to discharge his duties were stated by Vice-chancellor Knight Bruce in the case of *re Fynn*, 2 De G & S. 457. He said—

"The jurisdiction to which the present petition is addressed is one that, infinitely various as are the possible circumstances in which it is applicable, is yet restricted, and, I believe, wisely restricted, by certain principles and rules from which there can with propriety be in its exercise no departure. The acknowledged rights of a father with respect to the custody and guardianship of his infant children are conferred by the law, it may be, with the view to the performance by him of duties towards the children, and, in a sense, on condition of performing those duties; but there is great difficulty in closely defining them. It is substantially impossible to ascertain or watch over their full performance, nor could a court of justice usefully attempt it. A man may be in narrow circumstances—he may be negligent, injudicious, and faulty as the father of minors; he may be a person from whom the discreet, the intelligent, and the well-disposed, exercising a private judgment, would wish his children to be, for their sakes and his own, removed He may be all this without rendering himself liable to judicial interference, and in the main it is for obvious reasons well that it should be so. Before this jurisdiction can be called into action between them it must be satisfied not only that it has the means of acting safely and efficiently, but also that the father has so conducted himself or has shown himself to be a person of such a description, or is placed in such a position as to render it not merely better for the children, but essential to their safety or to their welfare, in some very serious and important respect, that his rights should be treated as lost or suspended—should be superseded or interfered with."

These principles had not been altered by the subsequent passing of the Judicature Act. They were still applicable and binding upon the Court in the exercise of its jurisdiction, and they were formally approved and deliberately acted on in *re Goldsworthy*, 2 Q.B.D. 75. Those rules govern this Court, and required that the Court, before it interfers with the rights of a testamentary guardian, or supersedes him in the exercise of his functions, should be satisfied either that the guardian has acted in so improper a manner or placed himself in such a position, as to imperatively require in the interests of the children in some essential particular that he should be superseded in the exercise of his office. Till such a case is adduced the Court has no jurisdiction to supersede a testamentary guardian in the exercise of his duties and rights with respect to the children, or to refuse to withhold from him the means by which he might be enabled to satisfy those duties and rights if from any cause the custody of the children which is essential to the performance of his duties as guardian, is withheld from him. He is entitled as a matter of right to claim the assistance of the Court in obtaining the custody of the children. This case might be considered, as it was considered, as one where the testamentary guardian applied for the custody of the children, and asked that they should be delivered up, and as if the Court was hearing an application for an injunction to restrain the testamentary guardian from proceeding with it. In such a case it would be necessary for the person who had the control and custody of the children to prove that the testamentary guardian was either an unfit person to have their care or that he had placed himself in such a position that it was not fit that he should be allowed to continue to exercise his rights and duties as testamentary guardian. On such an application, on a case made out adducing sufficient reasons, a reference might be made to the master in order to inquire into the facts and ascertain and determine what scheme would be best for the interest of the children, for their care, custody, and welfare, and whether on the whole it would be necessary and proper and for the benefit of the children that the testamentary guardian should be superseded and another person appointed. These two considerations were not entertained by the learned judge who dealt with the writ. The learned judge appeared to have decided it as if it were a question of the relative merits of two persons, each of whom was applying to be appointed as guardian. And on a review of the facts the learned judge came to a conclusion that they should remain with Mr. Wynne. He proceeded to state that his refusal to order Mr. Wynne to deliver up the children did not finally conclude the matter, and he said, "Should any change occur in Mr. Wynne's domestic arrangements, or in his household; should he not fulfil the promises he has made in his affidavit; or should the present satisfactory state of things, so far as these children are concerned, not continue, a fresh application should be made." That was in effect a superseding of the testamentary guardian, on the assumption that he was not a fit and proper person to have the care of the children, and an order that he should not have their care and custody till another person, who was appointed in his room, should appear to be unfit to retain their custody. The effect of that decision was to supersede the legal testamentary guardian, and the refusal to grant a *habeas corpus*, or the refusal of a writ, which the legal guardian was entitled to obtain from the Court, or the refusal to make an order which a party had the right to apply for, was in itself an order. This decision of the judge was an order in legal and practical effect that the testamentary guardian should not have, for a time to be determined only by the possible misconduct of another person, the custody of the children, and should not be allowed to exercise the rights conferred on him by his appointment by the testator. We think the judge proceeded on a wrong basis in dealing with this matter; that he did not consider the proper grounds upon which the application should be made and dealt with. The learned judge did not refer to the imputation cast indirectly and by inuendo only upon the testamentary guardian in the affidavits. He appeared to have

attached no weight, and very properly attached no weight, to it; and in the absence of any charge against the testamentary guardian, or proof that the guardian had misconducted himself, or placed himself in such a position as to be unfit to exercise the duties of guardian, the judge was not justified in withholding the relief claimed by the guardian; he was not justified in virtually superseding the guardian, and appointing another person to exercise his duties in his place. The appeal will be allowed, and an order made that the children should be delivered up to the testamentary guardian, Mr. John Richmond Smith, and that the costs of the appeal should be borne by Mr. Wynne.

HOLROYD, J.—One matter has been introduced into the consideration of the case which I think should not be mixed up with it. That was that the testamentary guardian happened to be residing out of the jurisdiction. The learned judge did not arrive at his decision on that ground. He referred to it no doubt in his judgment, but he did not base his determination upon it. What he was considering was the relative merits of the two schemes put forward, one by the testamentary guardian, and the other by Mr. Wynne, the stepfather of the children, as to the person with whom they should reside for the present. If a suit had been instituted or an action had been brought to remove the testamentary guardian on the ground that he was out of the jurisdiction of the court, or to have another guardian appointed to act with him, the Court might adopt various courses. It might allow the guardian, if he thought fit, to undertake to reside within the jurisdiction, and that would remove any difficulty; or it might appoint some other person to act as guardian along with him, and for that purpose it would refer it to the master or chief clerk to inquire and report as to who was a fit and proper person to act as guardian with him. It was possible that on the reference it might be found that Mr. Wynne should be appointed. It was equally possible that Mr. R. Smith might be appointed. But in either case the Court would pay the greater respect to the wishes of the testamentary guardian. It certainly would not treat residence out of the jurisdiction as a disqualification, more particularly having reference to the fact that he was out of the jurisdiction when he was appointed by the testator. Some valuable observations with reference to the position of testamentary guardian have been made in *Johnston v. Beatty*, (10 Ce & F. 122) where the Lord Chancellor said :—

"The Lord Chancellor has directed the master to enquire who are the proper persons to be appointed guardians of the infant, or, in other words to approve of persons to be guardians; to inquire what will be a proper maintenance for the infant, what her property consists of, and what scheme of education should be adopted. I apprehend therefore, that the order is a common rule of the Court and I really do not precisely understand the ground upon which it is objected to. I can state some of the objections which have been urged at the bar, but which appear to me to be altogether invalid.

One objection is this: that tutors and curators have been already appointed; that the young lady being a Scotch child tutors and curators have been appointed in Scotland by the will of the father. The father is dead and the mother also is dead; bnt the child is here in England. The tutor and curators are domiciled and living in Scotland; they are out of the jurisdiction of the Court. The Court can exercise no control over them; cannot make them amenable for any misconduct in the management of the infant; and I apprehend that in all cases the Court requires that there shall be a guardian appointed within the jurisdiction of the Court responsible to Court subject to its jurisdiction and its authority. If there be a parent, residing out of the jurisdiction, the Court interferes and appoints a guardian within the jurisdiction if there be a testamentary guardian residing out of the jurisdiction the Court appoints a guardian within the jnrisdiction; because it must have some person to look to, some person who is the representative of the Court on the spot, responsible to the Court, who shall have the care and management of the infant.

The tutors and curators, domiciled in Scotland, have no authority in this country: they cannot control the infant. If the infant chooses to take the protection of any other person who may be an improper person deluded, if you will, by that person the tutor and curators have no power of themselves to interfere. But they have the power to interfere through the medium of the Court of Chancery, a guardian may be appointed by the authority of the Court of Chancery: and if a complaint is made to that Court by the tutors and cuvators the Court of Chancery will set it right through the medium of the officer whom the Court has appointed. If it is thought desirable that the child should go to Scotland to reside the tutors and curators have no power to take the child to Scotland, unless the Court, having appointed a guardian, thinks fit for the benefit of the child to direct the guardian to hand the child over to the Scotch tutors and curators, in order that it may be carried to Scotland for the purpose of education or for any other purpose. Having regard to these observations it appears to me that the object of the Court in appointing a guardian to act along with the testamentary guardian was not in any degree to detract from the authority which belonged to the testamentary guardian, but to enable the Court to exercise that care which the Court of Chancery exercised over all guardians who had wards of Court A proper application to the Court would proceed iu the regular manner. In this case there would be an independent application on behalf of the infants by their next friend, that some person should be appointed to act along with the guardian appointed by the will. When that was done it would be time enough for the Court to act. At present we must treat the testamentary guardian as having full authority. That being so, what were his rights? Where there was no guardian, or where there was one not under the control of the Court, a reference was directed to the master. But what had been done in this case was to suspend the testamentary guardian and virtually to appoint another person as guardian without any reference to the master or chief clerk at all to appoint that person, or requiring him to give any security for the due performance of his duty which would otherwise be required of him, and to get rid of the necessity of a reference to the chief clerk for an inquiry concerning the maintenance and education of the infants and throw overboard altogether the wishes of the legal guardian, and by a mere fiat in Chambers to determine where for the present, the infants shall live, without going through the course which was invariably pursued by a Court of Equity. All the steps by which the Court obtains proper information have been overlooked and passed over. I will not go into the merits of either of the persons. Personally, I

think that Mr. Wynne has acted in as admirable a way as a man could have acted, and there was not the slightest doubt he would continue so to act. But that is not at all the question with which we have to deal. In reference to the lady whom it was proposed to take into the house to look after the children, her character has not been assailed and no imputation rests upon her. Her fitness for the position has been challenged in the most delicate way, and for reasons that were perfectly obvious, and which need not be stated. It would be a very unhappy thing for the children if they should come to learn, as they might come to learn, that the lady whom they come to recognise as a mother had had dissensions with her husband. The less they knew about that the better. This case was one as if the Court was asked to restrain by injunction the testamentary guardian from pursuing his legal rights. He ought to be placed in the position which the law entitled him to occupy. There was no imputation on his character, there was nothing proved against him, and there was no attempt to support the allegations made against him in the affidavits. Even if we were weighing in the balance the merits of the two opposite schemes, the Court would not go into the minutæ of detail which the learned judge seemed to have gone into. As one illustration—if provision was made by the father's will for the maintenance of a child—no instance could be found where the Court had taken that child from the testamentary guardian, and committed it to somebody else simply because that somebody else said he would maintain it. There were other little matters of a similar kind. People might form different opinions as to the relative advantages of the two schemes, but one could hardly judge fairly upon it on a writ of *habeas corpus*. So far as the affidavits went, there was nothing to show that one scheme could be said to be more to the advantage of the infants than the other in regard to their comfort, health, education, or pecuniary benefit. I say that because it must not be supposed that I agree with the learned judge in that particular, but this is not the proper time to deal with these matters. KERFERD J.—I concur and I rest my judgment on the ground of the want of power in the Court to supersede or set aside the testamentary guardian without cause. In the affidavits there was no imputtation cast upon the testamentary guardian. I think that the judgment against which the appeal was brought was one that the Court had no power to make in the absence of any imputation upon him. If the Court had power to appoint a guardian, I could not conceive a more difficult task it would have to perform than to decide upon these conflicting affidavits. We know what affidavits are. It would be utterly impossible to obtain from them information which would guide the Court in forming an opinion as to who was the proper person to take charge of the infants. If such an inquiry were made, it should be in another way than by affidavits.

Appeal allowed with costs.

Solicitors for appellant *Madden & Butler*; Solicitors for respondent *Cuthbert Hamilton & Wynne*

SITTINGS IN BANCO.

(Before Higinbotham C.J., Holroyd and a'Beckett J.J.)

IN RE JONES.

16th September.

Application for admission as a barrister—general rules of the Supreme Court, 1887, *rule* 8 *sub-section* 1—*Meaning of the words "University recognised by the University of Melbourne—the fact that a holder of the degree of B.A. of the University of Adelaide has been admitted with due form by the University of Melbourne ad eundem gradum is sufficient proof that the University of Adelaide has been recognised by the University of Melbourne.*

Application by Albert Edward Jones for admission to the Victorian bar. The applicant claimed to be qualified as a Bachelor of Laws of the Adelaide University and his admission was moved on an order signed by three judges of the Supreme Court. He had previously applied to the board of examiners for barristers for a certificate to entitle him to be admitted as a barrister but the certificate was refused. The board relied on rule 8 sub-section 1 of the rules of the Supreme Court 1887 which provides that:—

"Every person applying to be admitted to practice as a barrister in the Court shall—(1) be of good fame, and have attained the age of 21 years, and have been admitted to the degree of Bachelor of Laws in the University of Melbourne, or after examination in some University recognised by the University of Melbourne, and shall have been a student at law for at least one year."

The board decided that the Adelaide University was not one recognised by the University of Melbourne, and having refused to give the applicant a certificate he appealed to the judges under rule 11, which provides that "any person dissatified with the refusal of the board to grant him a certificate shall be at liberty to appeal against such refusal to the judges of the court, and such appeal shall be heard by any three or more of the judges at such time as they shall appoint, and they may dismiss or allow such appeal, or make such other order as to them may seem fit." Three of the judges (the Chief Justice, Mr. Justice Williams, and Mr. Justice a'Beckett) heard this appeal in chambers, and intimated an opinion that the Adelaide University was recognised by the Melbourne University, and the matter went back to the board of examiners, who, however, adhered to their original opinion that it had not been recognised, and refused to give a certificate. Mr. Jones again brought the matter before the judges. The case was then heard before the Chief Justice, Mr. Justice Holroyd, and Mr. Justice a'Beckett, in chambers, when it was decided to grant an order entitling him to be admitted as a barrister, and giving him leave to apply for admission.

Mr. Fink to move the admission.

Mr. Goldsmith to show cause. I appear to show cause against Mr. Jones's admission. The bar committee, having heard of the difference of opinion

between the board of examiners and the judges, have desired me to appear to support the opinion of the board And in order to avoid any difficulty under the rules I shall nominally show cause on my own behalf. Rule 17 provides that "any person may show cause to the board, the judges, or the court, against the admission of any applicant."

[*Holroyd, J.*—I think I should hold myself bound by the decision of the judges who heard the appeal. I do not see how the Court can sit and hear an appeal from the finding of the three judges who sat as a Court of Appeal.]

The order of the judges who heard the appeal from the board of examiners was made *ex parte:* if the order of the judges was final it practically took away the powers given by rule 17. [*Higinbotham, C.J.*—I think the dismissal or allowance of the three judges was not expressly intended to be final and the right is reserved to any person to show cause—the fact that the three judges made the rule seems to place us in the same position as if they had given the certificate.]

Their Honors decided to hear Mr. *Goldsmith* on the main question, reserving the point as to whether, at that stage, he was entitled to be heard.

Mr. Goldsmith.—Mr. Jones is a resident of Victoria. He went to Adelaide and was admitted to the degree of Bachelor of Laws there. He then went to Sydney, and obtained the *ad eundem* degree of Bachelor of Laws there. He then came back to Melbourne, and applied to be admitted *ad eundem* to the Melbourne University, and was refused twice. Mr. E. F. A'Beckett, the registrar of the University had made an affidavit, in which he said that in March 1889, Mr. A. E. Jones applied to the council of the University of Melbourne under the statutes of the University then in force to be admitted *ad eundem* to the degree of Bachelor of Laws in the University of Melbourne as a Bachelor of Laws of the University of Sydney. On the 23rd March, 1889, the professorial board of the Melbourne University made a report on his application, in which they stated that they desired "to point out that applications *ad eundem* for graduates who have taken the degree of LL. B. in the University of Adelaide have not been granted by this University, the degrees not being deemed equivalent. The present appears to be an application of the same kind made in an indirect way." On the 1st April, 1889, the council considered the application of Mr. Jones, and refused to grant his request; and on reconsideration of it on the 17th June, again refused the application. Mr. A'Beckett added in his affidavit that no statute or regulation has been passed by the University of Melbourne for the recognition of the University of Adelaide, or of any other university, and in every case which the degrees or the examinations of any university out of Victoria have been accepted by the University of Melbourne it has been on the special resolution of the council. The statutes of the University provided that "persons who have been admitted to degrees in any University recognised by the University of Melbourne, and who shall produce evidence of the same satisfactory to the professorial board, may be admitted to the same degrees in the University of Melbourne." It was admitted that on one occasion the University of Melbourne did admit to the *ad eundem* degree of Bachelor of Arts a gentleman who was a Bachelor of Arts of the Adelaide University, but it was submitted that that was not a "recognition" of that University in the proper sense of the term. The word "recognise" was not to be used in its colloquial meaning, but as a term of art. [*a'Beckett J.*—If the Melbourne University did not recognise the Adelaide University, then they acted illegally in admitting one person to a degree of Bachelor of Arts. The fact that they admitted him showed that they had recognised the Adelaide University.] That recognition only applied to that degree. It did not refer to all the degrees of the Adelaide University. In the report of the council of the University for the year 1884-5, it was stated that, "In accordance with the recommendation of the Professorial Board, the council has resolved to recognise each year of the course for the degree of Bachelor of Arts in the University of Adelaide, and also the degrees of Bachelor and Master of Arts of that University."

[*a'Beckett J.*—This application has nothing to do with the admission by the Council to an *ad eundem* degree of Bachelor of Laws. The council might be entitled to say that the Degree of Bachelor of Laws at Adelaide was not equivalent to that in the Melbourne University. But there was nothing in the rules of the Supreme Court for the admission of barristers to require that the two degrees should be equivalent. It was only required that it should be a degree of a University recognised by the University of Melbourne; and here the Melbourne University had recognised the Adelaide University by admitting one of its graduates to a corresponding degree.] That was only an isolated instance referring to one degree. The L.L.B. degree of Adelaide had not been recognised. I submit that the Adelaide University has not been legally recognised. It could only be recognised by a statute of the University, and it did not appear that any such statute had been passed. This was a matter of importance to the law school of the Melbourne University, because in the Adelaide University only a three years' curriculum was required, whereas in the Melbourne University the period of studentship was five years. People were not likely to spend five years in Melbourne if they could get the same advantages by going to Adelaide for three years. [*Higinbotham C.J.*—That might be a reason for altering the rules.] The Court cannot say that the University of Melbourne has recognised the University of Adelaide when the evidence of the registrar of the Melbourne University shows that no such recognition had taken place.

C.A.V.

17th Sep.

HIGINBOTHAM C.J.—Mr. Goldsmith has shown cause to the Court under rule 17 of the rules of 1887 against the admission as a barrister of Mr. Albert Edward Jones under an order made under rule 11 by three of the judges of this court, whereby it was

ordered that notwithstanding the refusal of the board of examiners to grant Mr. Jones a certificate under rule 10, he might, on payment of the proper fee, be admitted to practice as a barrister. In the view that we take of this case, it is unnecessary to determine whether the Full Court has jurisdiction on a motion like the present to allow an objection identical with one already heard by the judges on appeal by the applicant from the board of examiners, and overruled by the judges. Mr. Jones has claimed to be qualified under subsection 1 of rule 8, as a person who has been admitted, after examination, to the degree of Bachelor of Laws in a university recognised by the University of Melbourne. Rule 8, subsection 1 is in the following terms:—

"Every person applying to be admitted to practice as a barrister in the court shall (1) be of good fame and have attained the full age of 21 years, and have been admitted to the degree of Bachelor of Laws in the University of Melbourne or after examination in some university recognised by the University of Melbourne, and shall have been a student at law for at least one year."

Mr. Jones has produced in proof of this qualification his degree of Bachelor of Laws, granted to him by the University of Adelaide. It is objected for cause that the University of Adelaide is not a university recognised by the University of Melbourne within the meaning of rule 8. The question raised by this objection is one of fact, and is to be determined upon evidence by the board of examiners, or, in case of appeal, by the judges of this court. The acceptance or rejection by the council of the University of Melbourne of an application of a graduate of another university to be admitted *ad eundem gradum* must be determined by the statutes and rules of the University of Melbourne. Rule 8 of chapter 11 of the statutes is in these terms:—

"Persons who have been admitted to degrees in any university recognised by the University of Melbourne, and who shall produce evidence of the same, satisfactory to the professorial board, may be admitted to equivalent degrees in the University of Melbourne."

It appears on affidavit that such an application by Mr. Jones has lately been rejected by the council, not because the University of Adelaide is not a university recognised by the University of Melbourne, but because the professorial board reported that applications from graduates who have taken the degree of LL.B. in the University of Adelaide have not hitherto been granted by the University of Melbourne, the degrees not being deemed equivalent. Consideration of the equivalence of degrees is expressly sanctioned by the statute of the University, chapter 11, rule 8. It assumes a previous recognition by the University of Melbourne of the university whose degree is found not to be equivalent. The council of the University of Melbourne does not appear to possess under its statute the power of admitting a graduate of a foreign university *ad eundem gradum*, except where that foreign university has been recognised by it previously or by a simultaneous act. The rule of this court allows in a case like the present no consideration of the equivalence of the degree of LL.B. in the University of Melbourne with the same degree of a foreign university. Has that university been recognised by the University of Melbourne? That is the sole fact which the applicant for admission to practice as a barrister is bound to establish. The term "recognised" is ambiguous. It first found a place in our rules in connection with the right of admission to practise as a barrister as far back as the year 1857. It appears to have been introduced into our rules from the statutes of the University of Melbourne. There is ground for probable conjecture that it was first adopted by the first chancellor of the University, and a judge of this court, Sir Redmond Barry, who rendered distinguished services, that claim grateful notice, to both institutions at an early period of the growth of the University. It cannot be doubted, we think, that the word imports an act or acts of friendly notice by the University of Melbourne of the seats of learning and higher education that then were or that might be afterwards founded in the Australian and other colonies of Great Britain, and that the policy of the rule which contains and is based upon this word was to extend the comity that has been shown from the first by the University of Melbourne to the home universities of Oxford, Cambridge, and Dublin to similar institutions in Australia and elsewhere, which should establish an equally high standard of general education, and with which a friendly interchange of the same degrees might consequently be safely encouraged. It has been admitted on this argument, and it was clearly proved on the appeal to the judges, that a holder of the degree of B.A. of the University of Adelaide has been admitted with due form by the University of Melbourne, *ad eundem gradum*. No act can be done in our opinion that can more clearly show the intention of the governing body of the University of Melbourne to recognise the University of Adelaide. It could not indeed be lawfully done at all unless the University of Adelaide had been already recognised by the University of Melbourne. Omitting other proofs which are forthcoming, of inferior force, but indicating the same intention, we are of opinion that this proof is sufficient to establish the fact that the University of Adelaide has been recognised by the University of Melbourne, and that the applicant has thereby satisfied the only condition alleged to be wanting to his qualification to be admitted to practise as a barrister in this court. We express no opinion as to whether our rule 8 in its present form makes adequate provision in this respect for the qualification of a barrister. We only interpret and apply the rule of this court as it stands. Mr. Albert Edward Jones will, therefore, be admitted.

HOLROYD J.—The construction which is put by Mr. Goldsmith on our rule 8 would make that rule read in this way "been admitted to the degree of Bachelor of Laws in the University of Melbourne, or after examination in some university recognised by the University of Melbourne," with the addition of the words "admitted to such degreee." I hesitated whether I could import these words into the rule. But I think it would do violence to the language of the rule to introduce them. If the original intention of the rule

was as suggested by Mr. Goldsmith, unfortunately the framers of it have not given effect to it.

A'BECKETT J.—I concur with the judgment.

Mr. A. E. Jones was then admitted as a barrister of the Supreme Court.

SUPREME COURT SITTINGS.

(Before Hodges J.)

SEATH v. BOGLE.

October 23rd.

Will, construction—Contract for the sale of land—Subsequent devise to vendees.

A sold to his two sons certain land for a certain sum payable by instalments: before the time fixed for the payment of any instalment, A died having duly made his last will which bore date shortly after the date of the contract of sale; by his will he devised the land in question to his two sons (above mentioned) "for their own use in equal shares."

Held that the two sons took the land absolutely.

Action by William Seath (executor of Thomas Bogle deceased) against David Bogle and James Bogle. By a contract dated 4th July 1884, Thomas Bogle sold to the defendants, who were his sons, certain land at Doncaster for the sum of £1,050; the terms of payment were a deposit of £50 and the balance to be paid by two equal instalments on the 1st July 1889 and the 1st July 1894. The testator died on the 4th January 1885. He made his will on the 11th December 1884, and after appointing the plaintiff and the defendant David Bogle executors, provided (*inter alia*) as follows; "I devise and "bequeath my freehold property at Doncaster con- "sisting of . . . unto my sons David Bogle and "James Bogle for their own use in equal shares." The property mentioned in the will was the same property as was the subject matter of the above mentioned contract. David Bogle obtained possession of the contract immediately on the death of the testator and did not disclose the fact of its existence to the co-executor until shortly before this action was brought. The plaintiff asked for a declaration that the contract should be specifically performed.

Topp (with him *Anderson*) for the defendants; the devisees are entitled to take absolutely, *Nettleton v. Molyneux* (15 V.L.R. 13), on the question of costs *Hill v. Stewart* (13 V.L.R. 76) was referred to.

McArthur appeared for the plaintiff.

HIS HONOR.—By a contract dated the 4th July 1884, Thomas Bogle sold to the defendants certain land at Doncaster. He died shortly afterwards and before his death and after the contract he devised the same piece of land to the two defendants, David Bogle and James Bogle for their own use in equal shares. The contract still remained uncompleted and with the exception of the deposit no money had been paid. The plaintiff, as executor, seeks specific performance of the contract; the defendants say that they are entitled to be discharged by reason of the devise in the will. In my opinion that contention is the correct one. The devise in the will, if it only gave them the land after payment, would be giving them nothing at all. Therefore, so far as a testamentary disposition is concerned, it would have no effect. I think I should give the testator's words some meaning and I cannot give them any meaning unless I hold that the contention of the defendants is the correct one. I think that view is supported by a consideration of that part in the will in which he gives them the property for their own use. If they had come to the executors and asked them to transfer the estate to them, the executors would have had no reason to refuse but would have had to execute the transfer. If this were done, then when the executors, four years afterwards, called upon the defendants to pay the instalment, due under the contract, the defendants might ask them to show that they could give them the estate: and this they would be unable to do as they would have nothing to convey. So I think it is clear that the testator meant that the two defendants should take the property absolutely, and I refuse to make the declaration asked for. As regards the question of costs, one of the defendants was a co-executor; that defendant got the contract immediately after the death of the testator, but the whole estate appears to have been administered without his co-executor knowing anything about that document. I think under the circumstances I ought not to give costs. Judgment for the defendants without costs.

Solicitors for plaintiff, *Michie*; for defendants, *R. S. Anderson & Son.*

PROBATE JURISDICTION.

(Before Hodges,) J.

IN THE WILL OF W. B. WALKER, DECEASED.

Oct. 24.

No. 928, section 4, 7—Affidavit of conformity—Executor—Administrator—Master-in-Equity. The Master-in-Equity is not entitled by the terms of the Act to demand from the attorney under power, of an executor residing in England, an affidavit of conformity before the seal is affixed to the exemplification of the probate of a will.

Motion on behalf of A. B. Malleson, attorney-under-power of the executors appointed by the will of W. B. Walker, deceased, for an order directing the Master-in-Equity to affix the seal of the Supreme Court to an exemplification of the probate of the said will. It appeared that the Master had refused to permit the seal to be affixed because no affidavit promising due performance had been filed.

Bayles in support:—No such affidavit as the Master requires is necessary; sections 4, 7, and 11 of No. 928. No rules have been made as permitted by the Act.

Neighbour on behalf of the Master-in-Equity :—The word "duty" in section 4 comprises the duty of making the affidavit in question.

His Honor :—This is an application to the court for an order directing the Master in Equity to affix the seal of the court to the exemplification of the probate of a will. The application is made by the attorney under power of certain executors, and the question raised by the Master is, as to whether or not, before he should affix the seal, he is entitled to obtain what is termed an affidavit of conformity. It is urged by the Master that he is entitled to demand that, by reason of the 4th section of No. 928. In that section the following words occur; "and every such executor of "any such will and administrator of any such estate "and person authorised by power of attorney as afore- "said shall perform the same duties and shall have "the same rights and every such executor and adminis- "trator and person authorized by power of attorney "as aforesaid and the estate of every such deceased "person shall be subject to the same liabilities and "obligations as if such probate and letters of adminis- "tration had been originally granted by the Supreme "Court of Victoria." It is said that these words entitle the Master to require the affidavit in question before the seal is affixed. In my opinion that contention is not well founded. The duty which the administrator, under this section has to perform, is a duty which he is to perform after he is administrator and not before. And, so, I think that the duty which the executor has to perform is a duty which he has to perform after he becomes executor and not before. I think that this view is borne out by the terms of the 7th section which prohibits the Master in the case of letters of administration from affixing the seal "until "the statements of the estate of such deceased person "are filed in the office of the Master in Equity . . . . "and until all such probate stamp and other duties "(if any) have been paid as would have been payable "if such probate or letters of administration had been "originally granted by the Supreme Court of Victoria." This view being borne out by the words of this latter section I think the Master should be directed to affix the seal, or to take such steps as would enable the seal to be affixed. The act is somewhat difficult to comprehend and is curiously worded; and as the Master is justified in compelling the applicant to come here, in the discharge of a public duty, I shall give no costs.

Proctors; *Malleson England & Stewart.*

IN CHAMBERS.

(Before Kerferd, J.)

GUTHRIE v: GUTHRIE.

1st and 12th Nov.

Rules of Supreme Court 1884 *Order XXXI r.r.* 6, 11—*Interrogatories—objections to answering—Tendency of answer to criminate—Bona fides—*

Application on behalf of the plaintiff under order XXXI r. 11 for an order requiring the defendant to give a further and better answer to certain interrogatories.

The facts and arguments appear sufficiently from the judgment.

Dr. Madden in support.

Mr. Hood to oppose.

His Honor said I will consider the matter.

His Honor on a subsequent day delivered the following written judgment. This action is brought to obtain a declaration that the defendant, Mary Guthrie, is the trustee for the plaintiff, John Guthrie, of the proceeds of the sale of certain lands at Melaluka, in South Australia, and for accounts, and for payment of a sum which may be found to be due by the defendant to the plaintiff. It appears from the statement of claim that lands were obtained in the name of the plaintiff under the provisions of the South Australian Land Acts, and also in the name of the defendant, and that the plaintiff transferred to the defendant the lands in his name for the purpose of being sold in connection with lands held by the defendant, and this was done in pursuance of an agreement under which the plaintiff was to be paid a proportionate value out of the proceeds of the sale for the lands transferred by him to the defendant. The defendant denies the plaintiff's allegations, and states that as to any lands of which the plaintiff was the proprietor, he became so in violation of the provisions of an act of the Legislature of South Australia, intituled "The Waste Lands Amendment Act 1868-9," and in pursuance of an agreement made between the plaintiff and the defendant's husband, Thomas Guthrie, on the defendant's behalf, whereby it was agreed that he, the plaintiff, should select the lands, as the defendant, Mary Guthrie's agent, and the plaintiff, transferred the lands to the defendant, in pursuance of that agreement. The plaintiff interrogates the defendant as to whether he, the plaintiff, was not, in October, 1874, the proprietor of certain lands mentioned in the statement of claim; whether there was any agreement between the plaintiff and the defendant as to a transfer of such lands by the plaintiff to the defendant; whether the plaintiff did not in October, 1874, sign a transfer to the defendant of such lands, and what was the consideration, and in whose presence was it signed; for what price were the said lands sold by the defendant; whether her husband in September, 1876, held certain lands as agent or trustee for her, and at what price and to whom were such lands sold; were certain lands mentioned in the statement of claim selected or acquired by any person or persons as agent or agents for the defendant; whether she, the defendant, on the 1st October, 1874, and on 20th July, 1889, was possessed of or entitled to property for her separate use. The defendant contends that the answer to the first and to the last interrogatory is a question of law which she is not bound to answer, and she also upon oath declines to answer the other interrogatories, alleging that she believes answering

would criminate her or expose her to the risk of a criminal prosecution. I think the objection as to answering the first and the last interrogatory is a good one. With regard to the other interrogatories, by section 3 of the Federal Council Act No. 2 this Court is enabled to take judicial notice of all acts of Parliament of any Australasian colony. I have examined the acts of Parliament for the colony of South Australia relating to waste lands, and I find that for certain things it does entail penal consequences. In the case of *Lamb v. Munster* (10 Q.B.D. 110), it was held that "an objection to answer interrogatories, which is made by affidavit, on the ground of the tendency of the answer to criminate the person interrogated may be valid . . . if from the nature of the question and the circumstances such a tendency seems likely or probable." On the alleged state of facts as disclosed by the pleadings and the affidavit, and after considering the provisions of the act of South Australia referred to, I would say that the alleged agreements, about which information is asked, may fall within the provisions of the criminal law of South Australia. In *Smith v. Powell* (10 V.L.R., 84) it was held that the defendant alone can judge whether the answer which truth will compel her to give to the question or interrogatory will bring her within the peril or possibility of a conviction, and the judge must determine whether the objection is *bona fide* or not. The objection is taken on oath, and in the absence of evidence to the contrary I am bound to assume that it is taken *bona fide*. I therefore disallow the other interrogatories, as they are all connected and woven together, and the answer to any one of them may be a step in a criminal prosecution. Whilst I disallow the interrogatories I do so without prejudice to any application that may be made as to the fraud alleged in paragraph 4 of the defence—viz., that the plaintiff became proprietor of certain land in violation of the provisions of an act of South Australia, intituled the Waste Lands Amendment Act 1868-9. I think where fraud is alleged by the defendant the plaintiff is entitled to ask which of the provisions he has violated, so that he may know what he has to meet when he goes to trial. I dismiss the summons, costs to be costs in the cause. I certify for counsel.

Solicitors for plaintiff *W. H. Ford*; for defendant *Braham* and *Pirani*.

(Before Kerferd J.)

BLACKBURN v. WAGNER; NATIONAL BANK (Claimant.)

14th November.

Rules of Supreme Court 1884 *Order LVII. r.*, 1—*Interpleader where a sheriff is directed to levy upon a judgment debtor's interest in the property of a partnership, he should seize so much of the partnership effects as may be requisite and sell the undivided share of the debtor partner therein without reference to the state of the accounts between the debtor and his co partners and should assign the debtor's interest therein to the purchaser.*

Sheriff's interpleader.

It appeared that the execution creditor had obtained judgment against Wagner a member of the firm of Petsch Doehling & Co. The judgment creditor directed the sheriff as follows :—"In reference to the *fi fa* issued herein for costs against the defendant Wagner we desire that a levy should be at once made upon the defendant's interest in the property of the firm of Petsch Doehling & Coy. of William Street Melbourne importers. The members of that firm are Max Wagner the defendant, Felix Petsch and Felix Doehling." The Sheriff seized the goods which form part of the partnership property. A claim was made by the National Bank to these goods and notice thereof was duly given to the sheriff; and the sheriff then made the present application.

Mr. Fox for the judgment creditor.—There is an objection which will prevent the sheriff from obtaining relief. The sheriff has never been instructed to take the goods of the partnership in execution but merely to levy upon them the interest if any of Wagner in the partnership property. The execution creditor does not claim the goods he claims the interest of the judgment debtor in them and the sheriff can sell that interest as instructed. The claimant has not put in a claim against the interest of Wagner in the goods and that is the only thing that the sheriff is directed to sell.

HIS HONOR—I should like to hear the sheriff in support of these proceedings.

It was contended on behalf of the sheriff that the sheriff went into possession of the goods under the direction of the judgment creditor and he was entitled to be protected against any proceedings the claimant may take in respect of such levy; no notice to withdraw had been given.

HIS HONOR said :—The law is clearly laid down in "Lindley on Partnership" 5th Ed. at pp, 356, 357, and 358 and the duties of the sheriff with respect to seizure of partnership property are fully discussed there The modern rule is thus summarized "It was finally settled in conformity with the older cases that the sheriff's duty was, and it still is, to seize the whole of the partnership effects [seizable under a *fi fa*] or of so much of them as may be requisite, and to sell the undivided share of the debtor partner therein, without reference to the state of the accounts as between him and his co-partners. The sheriff, having seized the property of the firm proceeds to sell the interest of the judgment debtor in the chattels seized, and to assign the same to the purchaser." It is to be observed that the sheriff seizes sells and assigns but he has no business to take the goods of the firm out of the possession of the solvent parties. The sheriff therefore has no right at this stage to interplead. I refuse the application.

Solicitors for judgment creditor *Fox & Overend*; for the claimant *Malleson, England, & Stewart*; for the sheriff *Klingender, Dickson & Kiddle*.

SITTINGS IN BANCO.

(Before Higinbotham C. J., Williams and A'Beckett J. J.)

THOMAS v. ORMOND

Real Property Statute 1864 *S.* 69. *Action to recover possession of title deeds. A married woman can extinguish a power of appointment without her husband's concurrence notwithstanding the provisions of Section* 69 *of the Real Property Statute* 1864 *This section is enabling not restrictive.*

Action to recover possession of the title deeds to certain land in Fitzroy. Special case stated by consent for the opinion of the Court. The facts are fully stated in the judgments and the arguments turned on the point as to whether a married woman could extinguish a power of appointment created by a settlement without her husband's concurrence notwithstanding the provisions of Section 69 of the Real Property Statute 1864.

Mr. Goldsmith (with him *Mr. Hayes*) for the plaintiff.

The release of the power of appointment should have been with the concurrence of the husband and acknowledged under sect. 69 of the Real Property Statute 1864. (*a'Beckett J.* If the Married Women's Property Statute 1870 gives a married woman power to dispose of real estate as if she were a *feme sole* cannot she exercise a power over real estate?) No—the words "Real estate" do not include powers over real estate: *Williams Real Property* 16th Ed. page 333 He cited *Cahill v. Cahill* 8 App. Cas. 420.

Mr. Higgins (with him *Mr. Topp*) for the defendant.

Under the *Married Women's Property Act* 1870 a married Woman could dispose of her interest in real estate without her husband's concurrence. Real estate means any interest and includes a power of appointment; she could have sold the power of appointment and why can she not extinguish it? He cited *Sander v. Twigg* 13 V.L.R. 75, *London Chartered Bank of Australia v. Lempriere* L.R. 4 P.C. 572 and *re Patterson* 11 V.L.R. 768.

C.A.V.

30th September.

A'BECKETT J. read the judgment of the court:—The plaintiff in this case claims as against the defendants to be entitled to the title deeds of land in the parish of Jika Jika, and a special case has been stated raising questions of law to be determined. The plaintiff is trustee of a settlement dated 16th April, 1855. The defendants are the executors of a person who purchased the interests of the persons benefically entitled under this settlement, and we have to determine whether the interest he acquired as purchaser can be affected by the exercise of a power of appointment given by the settlement, or whether that power has been effectually extinguished. If it has been effectually extinguished the plaintiff has no right to bring this action. By the settlement dated April, 1855, land was granted and appointed to a trustee upon trust to pay the rents to Mary Ann Sarah Lansdown, or to allow her to receive them for her life for her separate use, and after her death upon trust for such persons as she should by will appoint; and in default of her appointment, upon trust for the settlor, William Lansdown, for his life; and after his death upon trust for the children of Mary Ann Sarah Lansdown who should be living at the time of her death. It has been questioned whether the trustees took the legal estate during Mrs. Lansdown's life, and whether the ultimate gift in default of appointment is a gift in fee or for life; but we think it unnecessary to determine these questions. Mr. Lansdown, the settlor died in April, 1865, leaving Mrs. Lansdown and one daughter, their only child, him surviving. In August, 1873, Mrs. Lansdown married one Thomas Campbell. The daughter married one James Frederick Poynting. By deed poll of 23rd August, 1875, Mrs. Campbell released or purported to release, unto Emily Susannah Poynting and her heirs the land included in the settlement, freed and discharged from the power of appointment in the settlement, to the intent that the said land should be discharged from the said power, and that Mary Ann Sarah Campbell might be debarred from executing the same, and that the land should devolve as in default of appointment. By deed of 11th July 1876, Mrs. Campbell and Mrs. Poynting appointed and conveyed the lands in the settlement for valuable consideration to Andrew Gibson Corbett. He died, and the present defendants are his executors and trustees. The question is whether Andrew Gibson Corbett got a good title as against the persons claiming under the settlement or who could claim thereunder as appointees under Mrs. Campbell's will, and this depends upon the validity of the deed poll by which Mrs. Campbell purported to extinguish her power. It is contended that, inasmuch as Mrs. Campbell's second husband was living at the date of this deed, and it was not acknowledged, as prescribed by section 69 of *The Real Property Statute* 1864, it is inoperative. Mrs. Campbell married her second husband after the passing of the Act No. 384, which provided by section 2 that a married woman should be capable of holding, alienating, demising, and devising real estate as if she were a *feme sole*, and by section 3 that every woman thereafter marrying should hold all real estate belonging to her before marriage free from her husband and from his control and disposition in all respects as if she had continued unmarried. We think that Mrs. Campbell's interest in the land in question was her real estate, both as to the estate and the power. It was a beneficial interest in land as to the life estate in possession, and as to the power it was an interest which she might bind by contract and receive the consideration for the contract. It cannot therefore be contended that Mr. Campbell had by virtue of his marriage any beneficial interest in the land in settlement as to which his concurrence could have been required to pass any interest to Mr. Corbett, the pur-

chaser. The argument for the plaintiff depends upon section 69 of the *Real Property Statute* and it is urged that unless Mrs. Campbell exercised this statutory power she, by reason of her marriage, and though her husband had no interest in the property, could not extinguish the power of appointment. In support of this contention, reliance was placed on a passage in the judgment in *Cahill v. Cahill*, L.R., 8, Appeal Cases at p. 425, referring to an extract from *Coke upon Littleton*—"A man and his wife are but one person in the law," which is the reason "why a man cannot grant or give his tenements to his wife during the coverture." Notwithstanding this old principle of the common law a married woman has always been regarded as competent to exercise a power. Her individuality has not been merged in that of her husband by the legal fiction to such an extent as to make her sole act in exercise of a power void or imperfect for want of her husband's concurrence. The law upon this subject is fully discussed, and the authorities are collected in *Sugden on Powers*, 8th edition, chapter 5. A married woman could at common law, without her husband, execute a naked authority, such as to sell lands, whether given before or after coverture, and though no special words were used to dispense with the disability of coverture. See *Coke upon Littleton*, 112. The right of independant action as to the exercise of a power should extend to its extinguishment. *Section* 69 of the *Real Property Statute* is enabling not restrictive; section 70 provides that it is not to deprive a married woman of any power which she possesses independently of section 69. We think that having reference to the provisions of Act No. 364, Mrs. Campbell was, with regard to the deed of 23rd August 1875, in the same position as if she had continued a widow, and, therefore, that her power of appointment was effectually extinguished. We answer the question stated by declaring that the plaintiff is not entitled to get the possession from the defendants of any of the title deeds mentioned in the case, and, in the exercise of our discretion as to costs, we order that they be taxed and paid by the plaintiff to the defendants.

Solicitors for the plaintiff, *Fox & Overend*; solicitors for defendant, *Herald*.

(Before Holroyd, Kerferd, and A'Beckett, J.J.)

COMMERCIAL BANK v. BREEN.

Transfer of Land Statute 1864 *sec.* 93—*Ejectment by mortgagee—Section* 93 *secures to a mortgagee under the Statute all the remedies he would have been entitled to under the old law in addition to the new remedies provided by the previous sections of the Act—therefore in a mortgage in the statutory form where no time is fixed for payment of the principal sum, the implied covenant for quiet enjoyment does not amount to a redemise, and the mortgagor is a mere tenant at sufferance and may be ejected without demand.*

Sembls, if a time certain is fixed for payment, the covenant would amount to a redemise for that period.

Appeal from judgment of the Chief Justice.

This was an action of ejectment tried before the Chief Justice, who, on hearing the evidence and arguments, directed judgment to be entered for the plaintiff.

The facts, so far as they are material, appear in the judgment.

Mr. Higgins, with him *Mr. Shiels*, for appellants.

The plaintiffs cannot maintain this action without having given a demand to the mortgagor. As the mortgagor was dead when the notice of demand was sent it was never given. Besides the demand is insufficient: it should have stated the exact amount due for principal and interest, whereas the demand merely asked for payment in general terms. He referred to *Colonial Bank v. Roache*, 1 V.R. (L) 165; *Colonial Bank v. Rabbage* 5 V.L.R. (L) 462; *McDonald v. Rowe*, 3 A.J.R. 90 *Doe d.*; *Hull v. Wood*, 14 M. & W 682; *Tew v. Jones*, 13 M. & W. 12; and *Massey v. Sladen*, L.R. 4 Ex. 13.

Dr. Madden (with him *Mr. Purves* and *Mr. Hood*) for the respondents.

No demand is necessary. Section 93 gives the mortgagee all the remedies he had under the old law. In the mortgage payment is on demand: therefore as no time is fixed for payment the covenant implied for quiet enjoyment does not operate as a redemise and the mortgagor was a mere tenant at sufferance and could have been ejected without any demand, much more the present defendant who is a mere stranger. He referred to *Vail v. Blair*, 13 V.L.R. 502; *Coote on Mortgages*, 4th. Ed. p. 684; *Shepherd's Touchstone*, p. 272; *Doe. d. Parsley v. Day*, 2 Q.B. 147.

C.A.V. 28th August.

Holroyd J. delivering the judgment of the Court said:—Action to recover certain lands described as allotments two three and seven section twelve Parish of Bungaree County of Grant. The case was tried before the learned Chief Justice who gave judgment for the plaintiff and from this judgment the defendant appeals. The facts so far as they are material are shortly these:—On the 30th March 1887 this land was transferred by Bridget Bourke now Bridget Breen the defendant the registered proprietor to one John Bourke: on the 7th July 1887 John Bourke mortgaged the land to the plaintiff the Commercial Bank; both transfer and mortgage were registered on the 16th July 1887; on the 8th October 1887 John Bourke died and on the 31st July 1888 the Bank sent a demand in writing for the principal and interest by registered letter to John Bourke at his address: John Bourke being dead the said demand never reached him and no other person was registered as proprietor in his place. The mortgage is in the statutory form, or nearly so and contains a covenant, by the said John Bourke.

"To pay to the said Bank . . . on demand in writing . . . given to me or left on the said land or sent through the Post Office by registered letter directed to me . . . the balance which shall for the time being be owing by me to the said Bank . . . . ."

It was contended that that demand was invalid first as it ought to have specified the exact amount claimed instead of making as it did a general demand for "all the principal moneys and interest secured by the mortgage" and second inasmuch as it was directed to a person who was dead. We were referred to various sections of the *Transfer of Land Statute* and more especially to section 84 containing certain statutory powers and rights conferred on mortgagees under the act and these sections gave no additional authority by which a mortgagee could sell or eject otherwise than as prescribed and as the demand was bad it was contended the mortgagee in this case had no power to eject or sell. It is difficult to construe that power in regard to the various sections to which we have been referred or to say whether the demand was good or not but we are of opinion we need not enter into these matters as the case is governed by the 93rd section which is as follows (His Honor read the section): the previous sections commencing at section 84 confer certain powers and rights on a mortgagee who holds a mortgage in the statutory form of land registered under the Act as if these rights and powers were inserted in the instrument itself in the first instance. In some cases certain rights and powers are deemed to be inserted, and the mortgagee is to have them; in other cases certain rights and powers are inserted, but in either case the effect is the same. Then comes the 93rd section as a dragnet, securing to the mortgagee in addition to these rights and powers all the rights and remedies he would have had under the old law We are all of opinion the mortgagee in this case would have been entitled to eject the mortgagor much more the present defendant, who holds and held adversely to him, and says the transfer was forged which the learned Chief Justice found was not forged. In ordinary cases the mortgagor is only tenant at sufferance to the mortgagee, and may be ejected without demand, and a stranger is in no better position. If however, the mortgage contains anything amounting to a redemise the case is different, and during the term of the demise the mortgagor is entitled to the enjoyment of the land, and the mortgagee cannot bring an ejectment. If the mortgage contains a covenant to permit the mortgagor to have quiet possession till default, and a time is fixed for payment that covenant amounts to a redemise to the mortgagor. It is different when no time for payment is fixed—in that case the covenant does not operate as a redemise. The contrary was held in *Doe d. Lyster v. Goldwin*, 2 Q.B.. 143; this decision was disapproved of in *Doe d. Parsley v. Day*, reported at page 147, in the same volume. The law on the subject is well summed up in Coote on Mortgage 4th Ed., page 684—

"If in the mortgage deed there is the usual proviso for the enjoyment of the land by the mortgagor, *until* default in payment *by a certain day*, then, although the land is in the hand of tenants, the proviso will operate as a redemise for the period in question."

But where the proviso is merely that the *mortgagee* may enter and take possession on default in payment on the given day, or that *the mortgagee* shall not take the profits until default in payment, or, as it seems, that the *mortgagor shall take* the profits until default in payment (*no definite time being in such last mentioned case fixed for payment of the mortgage money*), in either of these cases the proviso only amounts to a covenant, and the mortgagee may bring an action for land at any time without notice, though by the proviso he be required to give notice before entry, or though there be a covenant for further assurance by the mortgagor in case of default in payment. The action can be brought although a bill of exchange has been given for the debt. In the earlier case of *Doe v. Goldwin* when one of the trusts of a deed to secure an annuity was to permit the mortgagor to receive the rents until default in payment of the annuity, the Court of Queen's Bench held upon the authority of *Wilkinson v. Hall*, that the trusts amounted to a redemise and that notice to quit given by the mortgagor to a tenant of the premises, was valid against a notice by the mortgagee to pay rent. But, in his judgment in *Doe v. Day*, Lord Denman said, "it may be questioned whether sufficient attention was paid in that case to the point as to the certainity of time. The case can therefore hardly be considered as an authority." And when we look at the reason it cannot be considered an authority. In Shepherd's Touchstone page 272 the author says "If A do but grant and covenant with B that B shall enjoy a certain piece of land for twenty years; this is a good lease for twenty years. So if A promise to B to suffer him to enjoy such a piece of land for twenty years; this is a good lease for twenty years. So if A licence B to enjoy such a piece of land for twenty years; this is a good lease for twenty years. And therefore it is the common course, if a man make a feoffment in fee, or other estate, upon condition, that if such a thing be, or be not done at such a time, that the feoffor, &c., shall re-enter, to the end that in this case the feoffor, &c., may have the land and continue in possession until that time, to make a covenant that he shall hold and take the profits of the land until that time; and this covenant in this case will make a good lease for that time if *the uncertainty of the time* (whereunto care must he had) do not make it void." [*Mr. Preston* adds "The limitation of a certain term with a collateral determination on the event, would meet the difficulties of the case."] "And therefore if A bargain and sell his land to B on condition to re-enter if he pay him L100 and B doth covenant with A that he will not take the profits until default of payment, or that A shall take the profits until default of payment; in this case howbeit this may be a good covenant, yet it is no good lease, [for want" says Mr. *Preston* "of a more formal contract and also for want of certainty of time.] And if the mortgagee covenant with the mortgagor that he will not take the profits of the land until the day of pay-

ment of the money; in this case although the time be certain, yet this is no good lease but a covenant only, [since" says Mr. *Preston* "the words are negative only; and not affirmative."] Then we come to the language of the 93rd. section, which secures to the mortgagor the right to enjoy the land until default in payment of the principal and interest or some part thereof. It may be doubted if a time for payment were fixed the words would under the section amount to a redemise or do more than give the mortgagor a right to bring an action for breach of his right to quiet enjoyment: I would say yes—it does amount to a redemise, but to decide that is unnecessary; if, as in this case, no certain time is fixed for payment it is not a redemise and the defendant has no ground of defence by reason of the demand alleged in the statement of claim being insufficient, as the plaintiff can succeed without it; the statement of claim alleged a demand of the principal and interest default and the defendant taking wrongful possession—these allegations were immaterial; the defendant is a mere stranger: it was contended for her that having been in possession she was a tenant at will, but a vendor remaining in possession after conveyance is not a tenant at will but at sufferance; that contention also fails. These were all the points made by the defendant and we think she has failed and the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitor for appellant, *Gaunson and Wallace.*

Solicitorss for respondent, *Davies & Campbell.*

IN CHAMBERS

(Before a'Beckett, J)

WEEDON v. PECK & ORS.

22nd & 25th Nov.

Rules of Supreme Court 1884 *Order XXV. r.* 4—*The object of rule* 4 *of order XXV was to get rid of frivolous actions, and therefore, where a statement of claim discloses no reasonable cause of action, the proper course is to apply under this rule to have it struck out.*

Application on behalf of the defendants for an order that the statement of claim be struck out on the ground that it discloses no reasonable cause of action.

It appeared that the action was brought by Harriet Weedon against Hugh Peck, Martin Hood, and Adam Clapperton, claiming £1,000 damages for alleged libel. The statement of claim alleged that the defendants were directors of the Equitable Deposit and Mortgage Bank of Australasia, carrying on business in Melbourne; and that the plaintiff had in the way of business applied for and obtained a loan from the bank. The plaintiff complained that the defendants had libelled her by publishing a statement in reference to the affairs of the Equitable and Mortgage Bank, which implied that she had borrowed money by deceiving the bank as to the securities for the loan, that she had broken faith with the bank, and that she should be sued for what she owed.

Mr. Leon in support.

Mr. Shiels to oppose.

HIS HONOR said: I will consider the matter.

HIS HONOR, on a subsequent day, read the following judgment:—The plaintiff seeks £1,000 damages for a libel contained in a report by the defendants, who are directors of a company from which the plaintiff had obtained a loan. The report comments on certain ferences between the securities mentioned in the plaintiff's application and the security actually given. The defendants move, under order XXV, rule 4, to strike out the statement of claim, on the ground that it discloses no reasonable cause of action, that is to say, that the alleged libel is no libel. I can find nothing in the report as set out in the statement of claim which affects the plaintiff's character injuriously, or from which a reasonable man could infer any accusation of dishonesty against her. The final suggestion, that proceedings should be taken to recover the amount due, conveys no imputation that the amount has become due by reason of fraud, as alleged in the innuendo. The object of rule 4, as stated in *Batthyany v. Walford* (32, *Weekly Reporter*, 379), was to get rid of frivolous actions. I think this is a frivolous action, and that the present summons is the proper proceeding to get rid of it. I order the statement of claim to be struck out, with £3 3s. costs to be paid by the plaintiff to the defendant. Certify for counsel.

Solicitors for plaintiff, *Potts;* for defendants, *Bardwell.*

Before a'Beckett J.

STEPHEN v. PAIN.

15th 16th & 25th Nov.

Rules of Supreme Court 1884 *Order IX, r.* 2—*Substituted service—Where it appears that a defendant is resident out of the jurisdiction and that the contract sued on was neither made nor broken within the jurisdiction, an order for substituted service of a writ for service within the jurisdiction will not be granted.*

Application on behalf of the defendant to set aside an order previously obtained by the plaintiff for substituted service of the writ of summons Mr. Coldham in support cited *Cussen v. Macpherson* 6 A.L.T. 205, *Herrott v. Fleming* 24 L.J. (Q.B) 255; *Buttner v. Hallenstein* 3 V.R. (E) 25, *Duling v. Shannon* 1 W.W. & a B. (E) 25; *Adler v. Benjamin*, Times Rep. 308.

Mr. McArthur to oppose cited *Wright & Mills*, 82 L.T. Jo., 44; *Ford v. Shepherd*, 34 W.R. 63.

HIS HONOR said I will consider the matter.

HIS HONOR on a subsequent day read the following judgment.

In this case the ordinary writ for service within the jurisdiction was issued and I granted an application for substituted service on persons in Victoria having apparent charge of certain property of the defendant in Victoria, over which, according to the plaintiff's affidavit, the plaintiff had certain rights of security. The defendant so served applies by summons to set aside the writ and the order for substituted service on affidavits from which it appears that the defendant was resident in England when the writ issued, and that the contract sued on was neither made nor broken in Victoria. I think that in these circumstances the writ was wrongly taken out, and that I ought not to have made the order for substituted service. As to the order see *Wright v. Mills*, 82 *Law Times* 44, to which defendant's counsel referred me. In making the order I was under the impression that the action was intended to try the right of disposition over property in Victoria, and that an injunction motion was contemplated, which the persons having control of the property would have had a direct interest in opposing. I do not say that under the circumstances this would have been enough to have justified an order for substituted service, but even this justification does not exist, as the action appears to be one simply for money lent, and seeks no kind of relief as against the property. I think that even on the materials brought forward by the plaintiff I ought not to have granted the order. I now order that the writ and order and service thereof be set aside, with £4 4s. costs, to be paid by the plaintiff. Certify for counsel.

Solicitors for plaintiff *Weigall & Dobson*; for defendant, *Little*.

(Before Higinbotham, C.J., Holroyd and Kerferd J.J.)

IN RE SINCLAIR EXPARTE WATSON.

Sep. 30

Insolvency Statute 1871, *sec.* 14—*The Court of Insolvency has no jurisdiction to order a witness to pay costs.*.

This was a rule *nisi* to prohibit the Court of Insolvency, Melbourne, and the trustee of the insolvent estate of C. W. Sinclair from proceeding further with an order made on the 31st of May 1889, directing one C. M. Watson who had between examined as a witness in the estate to pay certain costs occasioned by his examination. The rule was applied for on the grounds that the Court had no jurisdiction to make the order. *Mr. Goldsmith* (with him *Mr. Topp*) to move the order absolute.

Mr. Higgins to show cause takes the preliminary objection that prohibition does not lie as appeal is the proper remedy. He cited *In re Levy* 1 V.L.R. (L) 271 and *exparte Carey*, 4, V.L. R, L. 408. [*Higinbotham C. J.*—Where a inferior court has no jurisdiction to make an order will not prohibition lie?] The Court overruled the objection.

The examination of a witness under section 133 of the Insolvency Statute is a substantive proceeding, and not like examining a witness on the trial of an action. The witness is a party to the proceeding as much as the trustee.

Mr. Goldsmith in reply.—The words person or persons in section 16 do not include witnesses: they only refer to parties to a contentious proceeding; the English Bankruptcy Act differs from ours.

The following cases were referred to *exparte Waddell* 6 Ch. D. 327. *In re Mackay* 2 V. R. (1) 22, *ex parte Reynolds* 21 Ch. D. 601, *in re Reeves* I.A.L.T. *in re Taylor* 11 A.L.T. 23.

HIGINBOTHAM C.J,—Rule *nisi* to prohibit the Court of Insolvency at Melbourne and the trustee of the estate of the insolvent from further proceeding in an order of the Court dated 31st May, 1889 Mr. Charles Marriott Watson, on whose behalf the rule *nisi* was obtained, was summoned before the Court of Insolvency and examined as a witness on the 27th, 28th, and 29th days of May, 1889, under part VII., sections 132-4 of the *Insolvency Statute* 1871. The witness had been the solicitor of the insolvent for many years prior to the insolvency, and was set down in the insolvent's schedule as a debtor in the sum of L4,000. When he was communicated with by the trustee he claimed that the insolvent was indebted to him. He was repeatedly applied to for a statement of his accounts with the insolvent but he neglected to furnish it. He was subsequently, and after a long delay, summoned to attend the court for the purpose of examination. The Court though it was applied to then made no order, but Mr. Watson promised the Court to make out an account of his transactions with the insolvent, and furnish it to the trustee. He delayed and neglected to fulfil this promise, and thus rendered it necessary that he should be further examined during three days at the end of May, to which the examination had to be postponed. The Court then ordered him to pay the taxed costs of the trustee of this last examination on the ground that it had been rendered necessary through his failure to deliver his accounts. The order was made under the 14th section of the act, which provides that "The judges of the Supreme Court, or of the Court of Insolvency may in all matters before them whether in court or chambers, award, either out of the insolvent estate or against any person or persons, such costs as to them shall seem just." The terms of the section are large. They apply generally to and include the numerous cases in which the insolvent and the trustee or assignee and creditors are engaged as parties in matters in contention between them, and also questions of disputed ownership of property. But we think that this section does not extend to the case of a person who attends for examination under part VII. in the character of a witness merely, so as render him liable to have the costs of such examination awarded against him. The proceedings under this part of the act are inquisitorial rather than contentious. They are had for the purpose of eliciting and discovering evidence for future use, not for the purpose of hearing and determining upon facts

already proved. The insolvent and every other person summoned before the Court to be examined is entitled to the same conduct money, and expenses as a witness in a civil suit, and ample powers are given to the Court of compelling the production by the insolvent of books, papers, and documents, and of punishing prevarication, or evasion, or refusal to attend, or to answer of any witness. The insolvent and all other persons are, for the purpose of this examination, witnesses only, and we think that it was not intended by the Legislature that in addition to his obligations and liabilities as a witness a person summoned to attend should be made liable for the costs of the examination merely because he had been dilatory in rendering, in pursuance of a promise, accounts which he had not been expressly ordered by the Court to produce at the examination, and which the Court had no power to order him to make out. As the Court had no jurisdiction, in our opinion, to make this order, the rule for prohibition must be made absolute, but without costs.

HOLROYD J.—Under section 133 of the *Insolvency Statute* the Court has power to summon before it the insolvent or his wife, or any other person known or suspected to have in his possession any of the estate or effects belonging to the insolvent, or supposed to be indebted to the insolvent, or any person whom the Court may deem capable of giving information respecting the insolvent, his trade dealings or property, or may require any such person to produce any documents in his custody or power relating to the insolvent, his dealings or property. There is no dispute before the Court. It is simply a proceeding in which the Court might get anybody before it, anybody whom it thought to be capable of giving information and might elicit from him without regarding the ordinary rules of evidence facts that might be used against him or any other person in connection with the insolvent's estate. If the witness refuses to answer questions or prevaricates, or refuses to produce books or documents, then he may be punished by imprisonment, and kept in custody till he does what is required. The section provides how the order of the Court is to be enforced. A person is entitled to his conduct money and expenses. But there is no power to inflict on him the costs of the proceedings for any cause whatever. In the English Bankruptcy Statute, section 19, it is provided that where a person admits his liability to the insolvent estate the Court may order him to pay the amount of the liability with or without costs, and that is a contentious proceeding in which the witness admits his liability. I am of opinion that under the Victorian act, section 14, it is not provided for the punishing of a witness by making him pay costs. The witness offers to make up a statement of accounts, but that is purely voluntary on his part, and he could not be compelled to do it. He could be compelled to produce all documents and books, but not to make out a statement of accounts.

KERFERD J.—I am also of opinion that under section 14 of the Insolvency Statute there is no power to give costs against a witness. The "matters" referred to in that section in which costs could be given mean contentious matters.

Order absolute without costs.

Solicitor for Watson.

Solicitors for Trustee *Lynch McDonald Stillman and Keep.*

(Before Higinbotham C.J. Williams, and a'Beckett, J.J.)

GREIG AND MURRAY v. HUTCHINSON.

Nov. 12.

Instruments and Securities Statute 1864 (*No.* 204) *Sec.* 21—*Setting aside judgment—Affidavit of merits—Under Sec.* 21 *Act No.* 204 *a judge has power to set aside a judgment obtained under that Act without any affidavit of merits being filed.*

Appeal from an order of *Kerferd J.* setting aside a judgment obtained by the plaintiffs against the defendants. The facts of the case and the order appealed from are reported in 11 A.L.T. page 53.

Mr. Hood (with him *Mr. Mitchell*) for the appellants.

There is a technical objection to this order. No affidavit of merits has been filed in support of the application. The Court will not set aside a regular judgment without such affidavit. *Chitty's Archbold* 14th Ed 267. Further, the question of priority does not apply. Judgments date from the earliest moment of the day the day they are entered. *Wright v. Mills* 28 L.J.N.S. Exch. 223. There was no merger. *Kendall v. Hamilton* L.R. 5 App. Cas. 504 which will be relied on by the other side is distinguishable. In that case judgment was entered against one co-contractor before the other was *sued.*

Mr. Isaacs for the respondent. These proceedings were taken under *The Instruments and Securities Statute* (1864); section 21 of that Act empowers a Judge to set aside a judgment without any affidavit of merits.

Mr. Hood was called on by the Court. Section 21 of the *Instruments and Securities Statute* was not relied upon in the Court below either in the arguments or the judgment. As to the necessity of an affidavit of merits see *Smith v. Dobbins* 37 L.T.N.S. 777. In any event the Court can vary the order appealed from.

Per Curiam. The learned judge had power to make the order under section 21 of *The Instruments and Securities Statute* (1864) but that section was not relied on either by the applicants for the order or by the learned judge when the order was made. If it had been it is not improbable that different terms would have been imposed on the parties. The appeal will be dismissed but without costs.

Appeal dismissed without costs.

Solicitor for appellants *Wyburn*; solicitor for respondent *Crisp.*

SITTINGS IN BANCO.

(Before Higinbotham, C.J., Williams and a'Beckett, J.J.)

COTTERILL v. CURRAN.

November 19th.

Married Women's Property Act 1884 section 4—a married woman is capable of suing in contract without joining her husband and without proof of separate estate.

Application to review an order of justices.

The complainant a married woman sued the defendant in the Police Court for a debt of L50. At the close of the complainants case the defendant's solicitor raised the objection that the complainant was a married woman and had given no proof of separate estate. The justices upheld the objection and dismissed the case. The complainant sought to review this order on the grounds that there was no proof she was a married woman and that even if she were that fact was no bar to her suing without joining her husband or giving proof of separate estate.

Mr. Irvine to move the rule absolute.

Mr. Johnstone to show cause. There was ample evidence before the justices that the complainant was a married woman. That being so in order to prosecute her action she must show separate property. By section 4 sub-section 2 of the *Married Women's Property Statute* 1884 a married woman's capacity to contract is limited to her separate property and therefore if she have no separate property she cannot sue in contract. He cited *Palliser v. Gurney* 19 Q.B.D. 519.

Mr. Irvine in reply. The objection raised in this case was that the complainant could not sue. To sue is one thing to contract another. He referred to *Capel v. Power*, 17 C.B. N.S. 743. Although she can only bind herself in contract as far as her separate estate she is under no incapacity to sue in contract even if she have no separate estate at all. He cited the Judgment of Lord Justice *Bowen* in *Weldon v. Winslow* 13 Q.B.D. 784 *Tilley v. Humphries* 10 A.L.T. 283, *Severance v. Civil Service Supply Association* 48 L.T.N.S. 485, and in *re Isaacs, Jacob v. Isaacs* 30 Ch. D. 418. (He was stopped by the Court.)

Nov. 19.

Per Curiam.—We think the proper order in this case is to make the order to hear the case absolute with costs. We think Mr. Irvine has correctly explained the true meaning of the 4th section, sub-section 2 of the Married Women's Act (1884). Under this sub-section, as explained by the 3rd sub-section, a married woman is capable of entering into any contract without proof of separate estate, and is also capable of suing in any case without joining her husband or giving any proof of separate estate. The language of the section is somewhat involved and we cannot give the true meaning to all its parts without reference to the interpretation of sub-section 3. The 3rd sub-section supports the view that the capacity of a married woman to enter into a contract is not limited to cases of separate estate but also contemplates a case in which it may be shown that a married woman has entered into a valid contract without possessing separate property. There is no doubt she can commit a tort and can sue or be sued in tort, and we think under the true construction of sub-section 2 she must have power also to enter into a contract, and sue on it without joining her husband although she do not contract so as to bind her separate property or even if she have no separate property at all. *Order absolute to hear with costs with a direction to the justices that the complainant is entitled to sue in this proceeding though she is not known to have separate property and though her husband is not joined.*

Solicitor for Complainant; *A. M. Williams.*

Solicitors for Defendant; *Morgan & Gill.*

(Before Higinbotham, C.J., Williams and a'Beckett, J.J.)

EWART v. GENERAL FINANCE AND AGENCY COY.

Transfer of Land Statute s.s. 84 *and* 85—*Action for recovery of money paid by mistake—Mortgage under the Act—Where interest only is in arrear service of notice on the mortgagor under section* 84 *to pay the money owing on the mortgage gives the mortgagor the option of paying off the interest before time limited so as to prevent the power of sale arising or of paying off both principal and interest at any time before a sale is effected—if the mortgagor exercises his option by payment of both principal and interest the mortgagee can only charge interest up to the date at which the principal money comes into his hands and not up to the time fixed for payment of the principal money in the mortgage.*

Appeal from judgment of *Kerferd, J.*

The facts are fully stated in the judgment.

Mr. Isaacs for defendant appellant.

The service of the notice did not entitle the plaintiff to pay off the principal and therefore his ignorance of it was immaterial. The only default was in payment of interest and if the plaintiff had paid the interest within one month the power of sale could not arise. The headnote in *Harvey v. Inglis* 5 W. W. & a'B 125 is misleading; in that case the tender of interest did not take place till the time for payment had elapsed. He referred to *McDonald v. Rowe* 3 A.J.R. 90 and sections 84 and 85 of the Transfer of Land Statute.

Mr. Topp for plaintiff respondent.

The notice to pay the money owing under the mortgage compelled the mortgagee to pay both principal and interest as money "owing" under the mortgage; even if he were only bound under section 84 to pay the interest the notice gave him the option of paying

both principal and interest as the mortgagee had intimated his desire to call in both principal and interest. He referred to *Edwards v. Martin* 35 L.J.N.S. Ch. 186.

C.A.V. 2 Dec.

MR. JUSTICE A'BECKETT read the judgment of the Court, as follows:—This is an action to recover £125 alleged to have been paid under mistake. The plaintiff had mortgaged land under the Transfer of Land Statute to the defendant company. The mortgage was dated the 17th of December, 1887. The principal (£2000) was payable on the 16th of December, 1889, and the interest was payable quarterly at the rate of £12 10s. per cent., with a proviso for reduction to 10 per cent. on punctual payment. The second and third quarters' interest fell into arrear, and the plaintiff, in consequence of a communication from the company, came to Melbourne from his residence in the country in September, 1888, and called at the company's office. He was there furnished with an account of his indebtedness, including two instalments of interest at the penal rate and the principal. He proposed to obtain an advance from the company on the land in mortgage and other security, but as the proposal was declined, he borrowed money elsewhere to pay off the mortgage. On the settlement of October 3 he was charged £125 for 15 months' interest, at 5 per cent., from the date at which the last payment of interest fell due up to the 16th day of December, 1889, the date at which the principal would become due under the covenant in the mortgage. The plaintiff paid this sum of £125 with other charges. The company asserted its right to charge interest in advance for the 15 months at 10 per cent., and took credit for generosity in only charging £5 per cent. The plaintiff at first thanked the company's manager for making the reduction. Afterwards he discovered a fact which led him to believe that the company had no right to insist on charging any interest in advance, and he demanded the return of the £125. This fact was that before the settlement with the company had been effected the company had left a notice demanding payment at the plaintiff's house in the country, of which the plaintiff knew nothing. It is contended for the plaintiff that the giving of this notice entitled him to pay off the mortgage forthwith, and that had he known of it he would not have consented to pay any interest in advance. The finding of the primary judge that the plaintiff was ignorant of this notice having been given has not been questioned. The contention before us has been that the serving of this notice did not entitle the plaintiff to pay off, and that therefore his ignorance of it was immaterial. This contention raises a question of considerable importance as to the rights of a mortgagor served with a notice under section 84 of the Transfer of Land Statute. The mortgage in the present case only varied the statutory rights of the parties as to sale on default by substituting "seven days" for the "one month" mentioned in sections 84 and 85. When the notice was given interest only was in arrear, and the notice was in these terms:—"To Mr. John Ewart, of the Launching Place, Parish of Woori Yallock, Publican.—The General Finance &c. Company hereby require you to pay the money owing on a mortgage from you to the company registered in the Office of Titles on the 21st day of December, 1887, and numbered 87,414." It is not disputed that if default in payment of interest had continued for seven days after the service of this notice, the company would have been entitled to sell the mortgaged land and to repay the principal money out of the proceeds of sale, although the time for payment of principal under the mortgage had not arrived. It has been argued for the plaintiff that, even if the plaintiff had been ready to pay the interest in arrear within the seven days, the mortgagee would not have been bound to have accepted it, and could have insisted on payment of principal as well as interest, as the statute authorising by section 84 a demand of the money "owing," not "due," entitles the mortgagee to sell unless within the period allowed after notice the principal, as well as the interest, be paid up. The plaintiff says that as the notice obliged him to pay off both principal and interest to stop sale, it conferred on him the right to pay off the principal and interest, although the time for payment fixed by the mortgage had not arrived. The defendant, on the other hand, contends that as the only default which had been made was in the payment of interest, and as under section 85 the power of sale is only to arise "if such default in payment shall continue for one month," this default could have been cured by the payment of interest alone, and that if the mortgagor paid interest only within the period limited by the notice he would prevent the power of sale arising. This, we think, is the correct view, and it is not at variance with that acted upon in *Hervey v. Inglis*, 5 Victorian Reports, as in that case the mortgagor did not tender the interest due until after the time for payment had elapsed. Although we agree with the defendant's contention that payment of interest only within the time limited would have prevented the power of sale from arising, we agree with the plaintiff's contention that the giving of the notice entitled the plaintiff to pay off the mortgage. By giving the notice the mortgagee intimates his wish to realise his security and to receive immediate payment of what is owing to him. The mortgagor may act upon this notice by paying off the interest within the time limited, or by paying off both principal and interest at any time before a sale is effected. It is clear that after the time limited by the notice had elapsed if default has continued during that period the mortgagee may sell without further notice to the mortgagor. The mortgagee having put himself in a position in which he can sell at any time, has put himself in a position in which he can be paid off at any time. The power he has acquired as against the mortgagor entitles the mortgagor to protect himself against its exercise. All that the mortgagee is entitled to is the money due to him, and as he has enabled himself to raise this amount by sale of the property, the mortgagor is enabled to prevent the sale by paying the money. The decision that

the notice given by the mortgagee entitles the mortgagor to pay off, leaves a further question to be considered, as to the terms on which he is entitled to pay off where the mortgage, as in this case, contains a covenant for payment at a future day which has not arrived, and for payment of interest in the meantime. If the mortgagor, could only have redeemed by paying the principal and the interest which would have become due up to the future date, the plaintiff would have no right to succeed in this action, and the company would have rightly supposed that it had abated a just claim by taking interest for 15 months in advance at £5 per cent. We have not found any authority distinctly defining the rights of a mortgagee who exercises his power of sale before the day fixed for payment of the principal with regard to the application of the money raised by the sale, or as to the terms upon which the mortgagor could stop a sale of which he receives notice before the day fixed for payment. The absence of authority may be explained by the reason stated in argument in *Hervey v. Inglis* that mortgages in England are invariably drawn making the principal due at the same time as that on which the first interest is made payable, or by the existence of special provisions in mortgages for a fixed term dealing with this contingency. The Transfer of Land Statute is silent on the subject, and in the absence of special provisions which the parties are at liberty to make for themselves, the case must be dealt with on general principles governing the rights of mortgagor and mortgagee. The mortgagor must be able to pay off by giving the mortgagee what the mortgagee would be entitled to pay himself out of the sale moneys. If in the case of a mortgage having five years to run, the mortgagee could at once receive his principal and five years interest in advance out of the proceeds of sale, the mortgagor could not get a release of the mortgage without making the same payment. We think that the mortgagee could not so apply the sale moneys, as by selling he shows his desire to anticipate the period fixed for payment, and he can only charge interest up to the date at which the principal money comes to his hands. By giving a notice enabling him to sell and to raise the principal at any time he intimates to the mortgagor his readiness to receive his principal at any time. We are dealing with the case as it stands on the statute alone. If this view involves any incovenience to mortgagees they can protect themselves against it by special provisions. The consequences of holding that mortgagees might pay themselves principal, and charge interest in advance as if it remained unpaid, would not only be oppressive as regards mortgagors, but unjust as against second mortgagees, who could only take the balance of the sale money. On the grounds above stated we agree with the judgment under appeal that the payment of L125 was made by the plaintiff in ignorance of a material fact of which the defendant should have informed him. The defendant was, however, entitled to interest on the sum due at L10 per cent. from the day on which the last quarter's interest fell due up to the day of payment. This amounts to L9 6s. 3½d. which should be deducted from the L125 to be paid by the defendant subject to this variation. The judgment under appeal is affirmed, and the appeal is dismissed with costs.

Solicitors for appellant; *Pavey, Wilson and Cohen.*
Solicitors for respondents; *Grave.*

SUPREME COURT SITTINGS.

PROBATE JURISDICTION.

(Before Hodges, J.)

Re Esther Legh.

Nov. 4, 6.

Practice Probate—Administration with the will annexed—Eldest son—Majority of interests.

A testatrix died having by will given all her property to her mother and appointed her sole executrix. The mother was too enfeebled by age to discharge the duties of administering the estate. An application was made by the eldest son for a grant of administration with the will annexed which was, however, opposed by the mother. Held that ceteris paribus, the eldest son is entitled to the grant; primogeniture, however, gives no right to preference against the wish of the parties interested.

Motion on behalf of Benjamin Muton Lucas to make absolute an order *nisi* obtained 26th Sept. 1889 by Benjamin Muton Lucas calling upon Susannah Daws Lucas to show cause why administration with the will annexed of one Esther Legh deceased should not be granted to the applicant. Esther Legh died on the 25th April 1889 having made a will dated the 17th Sept. 1873 whereby she bequeathed all her property to her mother Susannah Daws Lucas and appointed her sole executrix. It appeared that the executrix although sound in mind was so enfeebled in body as to be unable to carry out the active duties of administering the estate. It was her wish that one of her sons should perform the duties in her place, but she was strongly opposed to the appointment of the applicant by reason of certain dishonorable terms which he had on a previous occasion applied to her. Benjamin Muton Lucas on the other hand contended, that, as the eldest son of Susannah Daws Lucas, he was entitled to the grant.

Topp, for B. M. Lucas, contended that letters of administration with the will annexed should be granted to the applicant. He referred to Williams on Executors p 517 (vii ed.); *Re Boyd* (11 V.L.R. 117).

Higgins, contra: The appointment of B. M. Lucas would be against the wishes of the majority, or, in fact all of the parties interested. Williams on Executors p. 427. C. A. V.

His Honor:—One Esther Legh made a will dated the 17th September, 1873, and by that will she bequeathed all her property to her mother, and appointed her sole executrix. The testatrix died on the 25th

April 1889 leaving her mother surviving her. On the 26th September a rule *nisi* was granted for the administration of the estate on the application of the eldest brother of the deceased. The mother opposes the grant of administration to this son and the question is whether or not the order *nisi* should be made absolute in his favor. There is no doubt that the mother, if she were capable of administering the estate, would be the proper person to do so, she being executrix and also entitled to all the property of the deceased. But on the evidence before me it appears that the mother though in no sense of the term a lunatic, has, by reason of age, become so enfeebled in body the mind moves so slowly that she would be unable properly to administer the estate and being unable it would be necessary for some one else to do so. The question is should it be the eldest son or one of the other sons. The rule is laid down in Williams on Executors that wherever every thing else is equal the eldest son is entitled. But he also states that primogeniture gives no right of preference so as to weigh against the wish of the majority of interests. Here primogeniture seeks to get administration against all the interests and against the mother. The mother, although she may be unable to administer the estate, still as I have said, appears to be in no sense a lunatic, and is quite capable of expressing her likes and dislikes and her reasons for entertaining them. The applicant is one against whom she has a strong feeling as a son who has spoken of her in a way which she feels to be extremely unfilial and dishonoring and though in the witness box he did not absolutely reassert in express terms the dishonoring statement yet his manner showed that he was prepared to do so. As she then is capable of expressing her likes and dislikes and of informing the court of her wishes and is the only person directly interested, and as it would be against her wish and the wish of all the persons remotely interested to grant the rule to administer to the applicant I must, as there is another person able and willing to undertake the duty and who is in the same degree of kindred as the applicant and who is preferred by the only person directly interested—and by all those remotely interested—refuse this application. Moreover, I think that other things being equal, a man who is solvent and has proved himself capable of managing his own affairs is to be preferred to a man who is not able to keep himself out of the insolvent court. I think that the rule should be discharged with costs. It is suggested that this is really a solicitor's proceeding. This is not in issue at present and I express no opinion about it.

Solicitors; for applicant *Watson*; to oppose *Briggs and Snowball.*

(Before, Hodges, J.)

IN THE WILL OF JOHN MARK BUCKLEY, DECEASED.

Nov 7, 14.

Act (No. 928) sec. 4—Old will—Real property—Application was made to have the seal of the Supreme Court affixed to the exemplification of the probate of a will which had been proved in England in 1855. The only property of the testator in the colony was real estate.

Held, that Act No. 928 is to be construed as an Act dealing with the granting of probates and letters of administration, and therefore the same objection as would lie to the granting of the latter, would also lie to applications to have the seal affixed under sec. 4.

Application to have the seal of the Supreme Court affixed to an exemplification of the probate of the will of John Mark Buckley, deceased. The testator died in the Crimea, Europe, in August 1854 having previously made a will dated 21st March, 1854, whereby he appointed his widow, his brother James, and one James Wilson executrix and executors. The widow subsequently intermarried with James Wilson, who has since died as has also the other executor. The testator at the time of his death had real property in Victoria valued at L100, but which is now estimated to be worth L2,750 Probate of the will had been originally granted in England in August 1855, but as it was deemed advisable for the purpose of dealing with the Victorian property to take the benefit of the 4th. section of Act No. 928, an exemplification of the will was recently obtained and an application was made to the Registrar to have the seal of the Supreme Court affixed. The Registrar refused to do so on the ground of the long delay, which was not explained, and for other reasons. Application was now made to the Court to direct the Registrar to have the seal affixed, the applicant being Sydney H. Wilson, the attorney under power of the executrix.

MacHugh in support: The Registrar has acted on such authorities as *re David Jones* (12 V.L.R. 307), but it is submitted these cases do not apply; section 4 of Act No. 928 enacts that when certain preliminary steps have been taken the seal of the Supreme Court *shall* be affixed. This Act is different from the *Administration Act* 1872 inasmuch as the latter simply gives jurisdiction while the former imposes a duty.

C.A.V.

His Honor:—

In this case one John Mark Buckley died in August 1854 and Probate of his will was granted in England in 1855. In about 34 years afterwards an exemplification of the Probate is obtained from the English Court of Probate and it is asked that the Registrar should affix the seal of the Court to that exemplification. The Registrar has refused to affix the seal whereupon an application is made to the Court to direct that the seal should be affixed. It has been contended that the Court has no discretion in the matter and that the 4th section of the Act No. 928—provides that when certain things are done the seal shall be affixed. In my opinion the act must be construed as an act dealing with the granting of probate and letters of administration, and must be construed with reference to the law as it existed on these subjects at the time the act was passed and it has long been the

practice of the Court not to make such grants for the mere purpose of facilitating the making of title. I think this rule should be borne in mind in the construction of this act. Under the circumstances disclosed in this case, if probate or letters of administration were being applied for, the Court would refuse to make such grant. Therefore I think I ought to refuse to direct the Registrar to affix the seal to this document. I do not say that, if circumstances were shown such as to make it evident that no injustice would be done, and that justice could only be done by granting the application I would refuse to direct the seal to be affixed. The Court perhaps, might take a different view if proper undertakings were given that no rights would be attacked, notwithstanding the lapse of time. But no evidence has been brought before me such as would enable me to arrive at that conclusion and I therefore refuse the application on the present materials.

Proctors *Davies Price* and *Wighton*.

PRACTICE COURT.

(Before Holroyd, J.)

EX PARTE MARION LANE.

30th Sept., 8th Oct.

Companies Statute 1864 (*No.* 190) *ss.* 23, 24, 35, 68, 90, 121, 116 (8), 154—*Sch.* 7. *rr.* 26, 27—*The Court has jurisdiction to entertain an application on behalf of a person, whose name has been placed in the list of contributories by the liquidators in a voluntary winding up, that his name may be removed The rule prescribed for proceedings for settling the list of contributories in a compulsory winding up apply to a voluntary winding up.*

Motion to remove name from list of contributories. This was an application by way of motion to remove the name of Marion Lane from the list of contributories settled by the liquidators. The Company was being wound up voluntarily. It appeared from the affidavits that Mrs. Lane had, in December 1884, applied through one Michael Egan, a promoter of the Patent Victoria Hydraulic Freestone Company Limited for fifty shares of a new issue in the company and she handed him a cheque for L2 10s, being the sum payable on application at the rate of 1s. per share. A few days afterwards she informed Egan that she did not wish to take the shares and would forfeit the application money. On the 18th December 1884, the Secretary of the company wrote to Mrs. Lane saying "that upon payment on or before the 23rd inst of the allotment of 1s per share on 50 shares this number of the new issue will be allotted to you and scrip issued for the same." Mrs. Lane, upon receipt of this wrote saying that she did not want the shares and would forfeit the application money. The Secretary said that he had no recollection of ever receiving this letter. The clerk of the applicant's solicitor searched in the office of the Registrar General and inspected the papers of the company lodged in the office, and he deposed that Mrs. Lane had not signed the memorandum or articles of association. He further deposed that the company had lodged in the office of the Registrar General in compliance with Sec 24 of the Act No. 190 a "list of members and summary" on the following dates, viz:—15th September 1882, 16th November 1882, 22nd May 1884, 19th December 1884, 11th December 1885, 25th August 1886, 4th June 1887, and 21st May 1888, and that the name of Mrs. Lane did not appear as a shareholder in any one of the said lists of members; further that in the "List and Summary," lodged on the 11th December 1885, there appeared the following heading:—"List of those who have ceased to be shareholders through forfeiture" and then followed the name of Mrs. Lane. No notice of any appointment to settle the list of contributories was ever sent to Mrs. Lane. The liquidators commenced an action on the 26th July 1889, against Mrs. Lane to recover the amount of calls due. The register of the company was not produced before the court at the time this application was made.

Madden in support of the application.

The name of the applicant should be removed from the list of the contributories, inasmuch as she was never a member of the Company, and she never received any notice of the intention of the liquidators to put her name on the list.

Goldsmith to oppose.

An application of this nature is not contemplated by "*The Companies' Statute* 1864." The liquidators under the provisions of section 116 of the Act are to settle the list of contributories, and the list is *primâ facie* evidence of the persons who are contributories, It is only in the case of a compulsory winding up that notice is required. The procedure open to the present applicant is to appeal from the order settling the list. The procedure applicable to a compulsory winding up is not applicable to a voluntary winding up. The time to challenge the list is when the liquidators attempt to enforce the liability, and it must be done in the proceeding in which the attempt is made. There is no power in the Act to stay the liquidator from suing for calls. In the action which the liquidators bring to enforce her liability, the defendant may set up any defence that is open to her. This is not an application to rectify the register under sect. 33, but to alter the list of contributories, and that section only applies to a "going" company.

Madden in reply. The rules under the Act which apply to voluntary winding-up as well as to compulsory winding-up, and by r. 25 of the seventh schedule to the Act the list of contributories may be varied by leave of the judge, and by rule 26 notice must be given to each person included in the list.

Goldsmith referred to *Buckley* on *The Companies Acts*, 5th ed. 305.

HIS HONOR said: I will consider the matter.

His Honor on a subsequent day, said · In this matter a motion was made to me on behalf of Mrs. Lane that her name might be removed from the list of contributories settled in the matter of the winding-up of the Company. It appears from the affidavits that the Company is in the course of being wound-up voluntarily, and that the liquidators have settled a list of contributories, on which they have placed the name of Mrs. Lane for fifty shares. She never received any notice to attend on the settlement of the list of the contributories. The liquidators have brought an action against her to recover the amount due as it was stated on her shares, being a sum payable on allotment and subsequent sums which have become due for calls. The first question I have to determine is whether I can entertain this application. It is provided in sect. 121 of *The Companies Statute*, 1864, that "where a company is being wound up voluntarily the liquidators or any contributors of the company may apply to the Court to determine any question arising in the matter of such winding-up, or to exercise as respects the enforcing of calls or in respect of any other matter all or any of the powers which the Court might exercise if the Company were being wound up by the court and the court if satisfied that the determination of such question or the required exercise of power will be just and beneficial, may accede wholly or partially to such application on such terms and subject to such conditions as the Court thinks fit; or it may make such other order or decree on such application as justice may require." That section is expressly made in the very widest terms: the application may be made by the liquidator or "any contributory of the Company." Then section 68 gives a definition of the term "contributory." [His Honor read the section.] This is a proceeding for determining whether Mrs. Lane is to be deemed a contributory or not; she is a "person alleged to be a contributory" and therefore she comes within the meaning of the word "contributory" in section 121, and may make an application under that section. Under section 90 it is provided that as soon as may be after making an order for winding up the Company, the Court shall settle a list of contributories with power to rectify the register of members in all cases where such rectification is required in pursuance of this Act. That is in the case when the Company is being wound up by the Court and power is given to the Court to rectify the register of members as I have stated "in all cases where such rectification is required in pursuance of this Act." The list of contributories ought to follow the register of members and in order to make out a list of contributories the Court ought to rectify the register of members if necessary. It is provided by sub section 8 of section 116 that "the liquidators may exercise the powers hereinbefore given to the Court of settling the list of contributories of the Company; and any list so settled shall be *primâ facie* evidence of the liability of the persons named therein to be contributories." It was contended that all that was given to the liquidators under the voluntary winding up by that sub-section was simply the power vested in the liquidators by section 90, to settle the list of contributories. Nothing was said by Counsel who advanced that argument about the power to rectify the register of members. The power given by section 90 to the Court if exercised by the liquidators properly should have induced them to rectify the register before settling the list of contributories if it was required. That could only be done upon the application made to them by some person alleged to be a contributory. However, I am not founding my judgment on that question. The power given by sec. 90 is a bare power to settle the list of contributories with power to rectify the register of members if necessary. By section 154 it is provided that "the proceedings for winding up a Company by the Court or subject to the supervision of such Court shall be conducted in the manner and subject to the rules contained in the seventh schedule hereto." It is contended that because section 154 comes after section 116 that the rules by which proceedings for settling the list of contributories are prescribed when the Company is being wound up by the Court have no application to the case of voluntarily winding-up. I cannot agree with that argument. If the liquidators had exercised the power given to the Court in settling the list of contributories they should have exercised it in the way in which the Court is bound to exercise its powers; and on reference to the rules 26 and 27 of the 7th Schedule it will be found that the official liquidator has to obtain an appointment from a judge and has to give notice in writing to every person included in the list, stating in what character and for what number of shares such person is included in the list etc., The object of the rules of course being to enable the person to get his name struck off the list. I think it is only reasonable that the liquidators should have given Mrs. Lane an opportunity to have her name taken off if improperly put there. But whether they ought to have done so or not, whether they had power to do so or not, one thing is clear that if a person's name were put on the list of contributories in the course of the winding-up of the Company by the Court and such person has received no notice of having been put there, the Court, upon application by such person to have his name struck off would entertain it and would if necessary rectify the register. Without reference to any authority I come to the conclusion, upon the language of the Act itself, that I have full power to entertain this application. I was not referred to any authority and I know of no authority that upon application in a voluntary winding up, by a person who alleges that his name has been put improperly upon the list, the Court may strike that name off. Mr. Goldsmith referred me to Buckley on the *Companies Acts* which has led me to look at the number of cases therein cited which show very clearly how the English judges interpret the powers given by sect. 121, which corresponds with section 138 of 25 & 26 Vict. c. 89. I am not surprised that Mr. Goldsmith did not actually cite those cases inasmuch as they are strongly against him but I must thank him for having assisted me to find them out for myself. In

the case of *The Bank of Gibraltar v Malta* (L.R. 1 Ch 69) which was an application in the voluntary winding up of a company by a contributor who charged the directors with fraud and asking that the company should be wound up under the supervision of the court, the application was refused but in the judgment of Turner L. J., he said "The case brought forward by this petition rests on the alleged breaches of trust and misconduct on the part of the directors, but these are matters which may be examined into and if *need* be corrected without any order for winding up the company under the supervision of the Court. They can be reached, if not under the 165th, at all events under the 138th section of the Act. These charges therefore do not seem to me to furnish any ground for an order to wind up under supervision; not do I find anything in the circumstances of this case which would render it necessary to put in force any of the provisions of the Act applicable to a winding.up under supervision which would not be available in case of a voluntary winding-up. It is to be observed too that the Legislature clearly intended that the wishes of the contributories should be consulted as appears by section 149." Now though part of this judgment is a little ambiguous as reported the meaning is clearly explained in a subsequent case. *In Riane's case* (L. R. 6 Ch. 104) it was held that the Court had summary power in a voluntary winding-up on the application of the liquidator to make an order under the 138th or 165th Section of the English Act calling upon a director to repay a dividend of bonus declared and paid to him under a delusive balance sheet. James L. J. in that case referring to the case above nentioned said, "I think that the case of *In re Bank of Gibraltar and Malta* is as striking an example in that respect as we could have: because there the Court declined to accede to the application for a supervision order, expressly on the ground that whatever was the jurisdiction of the Court under the supervision order would be the jurisdiction of the Court under a voluntary winding-up. And the same opinion was expressed by Lord Justice Rolt in the case of *In re Beaujolais Wine Company* (L. R. 3 Ch. 28) although the point did not come before him in the same shape. That would seem to result in this that the object of the Act was that the Company its creditors should be left if possible to settle their affairs without coming to the Court at all, either for a compulsory winding-up or for a winding-up under supervision, but to provide them, under the 138th sect. with the means of access to their Court whenever any question arose in the case of a compulsory winding-up or under supervision. And for myself if it were an original matter I should be inclined to take the same view of the matter. No doubt if a liquidator did not do his duty, if he did not take the opinion of the Court in such a case as this, for example, it would be in the power of a creditor to apply to this Court for a proper order which would give him some opportunity of obtaining the decision of the Court. . . . It appears to me therefore that the Court has jurisdiction under sections 138 and 165." There are two other cases which point to exactly the same conclusion; *Black and Co's.* Case (L.R. 8 Ch. 254 p. 263) and finally in the case of *In re Union Bank of Kingston upon Hull* (13 C.D. 808) where it was held by Jessel M.R., that the liquidator, in a voluntary winding-up, may apply to the Court under sect. 138, of the *Companies' Act* 1862, to determine any question fairly arising in the winding-up and any such application may be either by motion or summons. I think, therefore, that there is ample authority to show what the language of the Act itself would have led me to conclude, that the Court can entertain an application of this kind when made by a person alleged to be a contributory under a voluntary winding-up. There is no doubt that the Court would entertain an application to rectify the share register, and the list of contributories where a voluntary winding up is being continued under the supervision of the Court; many cases of that kind may be found, but I will refer to one well known case, viz, *In re Overend Gurney and Co. exparte Oakes and Peek*, (L.R. 3 Eq. 576). Coming to the facts of this case I have some difficulty owing to the share register not being before me. If I were to decide this application upon affidavits alone, I should come to the conclusion that shares never were allotted to Mrs. Lane. The affidavit of her solicitor's clerk, discloses a very curious state of things, he says that he found upon searching that the company had lodged in the office of the Registrar General a list of members on the 19th Decr. 1884, 11th Decr. 1885, 22nd August 1886, 4th June 1887 and 21st May 1888, and on no other days, and that the name of Mrs. Lane does not appear as a shareholder, on the list of members. It appears that on the 18th Decr. 1884, Mrs. Lane who had made application through Egan for 50 shares of the new issue of this company, and handed him a cheque for L2 10s. 0d., being at the rate of 1s. per share, received from the secretary of the company a letter written in his name by his substitute, in the following words—[His Honor read the letter]. That is not an allotment of shares, it is an intimation that upon payment of allotment money of 1s. per share, the shares will be allotted to her. Mrs. Lane states that on receiving this letter she wrote saying that she would forfeit the money already paid by her. The secretary and the assistant who was acting for him at that time both state that they have no recollection of receiving that letter, and that they have searched for it or for some mention of it in the minutes but cannot find it. On the other hand they subsequently wrote letters or a letter as they say, to Mrs. Lane, treating her as a shareholder, and liable for calls. She says she never received these letters. The fact, however, remains according to the affidavit of the clerk referred to that there is no mention of this lady's name as a shareholder in the lists mentioned. The letter which the secretary refers to as the actual allotment was received by her on the 18th Decr. 1884. The list afterwards filed does not contain her name, and in four other different lists her name does not appear. But this does appear, in a list and summary lodged in Decr. 1885, there appears a list of those who

ceased to be shareholders through forfeiture and Mrs. Lane's name is there. So that the only entry is that she forfeited her shares, but there is nothing to show that she ever was a member. The list ought to follow the share register, and the share register to contain the names and addresses of the members of the company and certain further particulars, the date at which the name of any person was entered in the register as a member and the date at which any person ceased to be a member. (His Honor read sect. 23) Then by sect 35 the register is made *prima facie* evidence of all matters by the Act directed or required to be done. It is provided by sect. 24 that the list shall contain certain particulars fully set out in the section and I should follow the share register. If the register is not properly kept or if the list is not duly made out and forwarded to the Registrar General, every director is liable to a penalty not exceeding L5 for every day during which such default continues. I also wish to point out that when an application is made to rectify the share register, the court if it has any doubt about the matter may direct an issue to determine whether the person alleged to be shareholder is or is not a shareholder. In this case there is an action being brought against this lady and before I finally determine what I shall do in the matter, I think I ought to have the share register before me, and unless the share register shows that this lady ought to be on the list, I should direct her name to be struck off. I shall therefore adjourn this application and direct the liquidators to produce the register before me.

Solicitor for the applicant, *D. Wilkie*; Solicitors for the company, *Brahe & Gair.*

IN CHAMBERS.

(Before a'Beckett J.)

GREIG & MURRAY LIMITED. v. HUTCHINSON.

26th, & 29th Nov.

Rules of Supreme Court Order XXXII. r. 6—Judgment on admissions in the pleadings—This rule was not intended to apply to a case in which the admission is an admission of fact raising a difficult question of law.

Application on behalf of the plaintiffs under Order XXXII r. 6 calling upon the defendant to show cause why judgment should not be entered for the plaintiffs with costs upon the admissions contained in the pleadings.

The pleadings were as follows :—

STATEMENT OF CLAIM.

The plaintiff Company claim £840 1s. 10d. for principal and interest due to it as the endorsees of the promissory notes of which the following are copies. The promissory notes with endorsements were here set out.

DEFENCE.

The said promissory notes were made by the defendant jointly with the said H. Pett whose name appears in the endorsement of the writ of summons herein as one of the joint makers of the said notes and not severally and the plaintiffs afterwards on the 2nd of August 1889 in an action brought by it against the said H. Pett in this Honourable Court upon the same promissory notes which said action is numbered 4456 of the year 1889 recorded the judgment against the said H. Pett for £840 1s. 11d. together with £5 16s. 4d. for costs and £1 1s 5d. for interest and the said judgment still remains in force.

REPLY.

1. Save that they deny that the said judgment mentioned in the defence is still in force they admit the allegations of fact in the defence.
2. The said judgment was by the order of His Honor Mr. Justice Hodges dated the 5th September 1889 set aside.

REJOINDER.

1. He joins issue on paragraph 1.
2. As to paragraph 2 he admits the facts therein set forth.
3. He will object that the said judgment having once merged and destroyed the plaintiff's cause of action upon the said notes sued on herein, the setting aside of the said judgment could not revive such cause of action.

Mr. Mitchell in support.—All the facts are admitted on the pleadings and the plaintiffs are entitled to a judgment. If a judgment acted as a merger when that judgment was set aside the cause of action would be gone. He cited *Cannon v. Reynolds* 5 El. & Bl. 301; *Bayley v. Turner* 6 D. & L. 730.

Mr. Isaacs to oppose.—This is an application under a rule strictly analagous to order XIV r. 1. Under that rule a judge can only act under a clear case. The Court will not act under this present rule unless the case is clear. *Gilbert v. Smith* 2 Ch. D. 686; *Chilton v. London Corporation* 7 Ch. D. 735; *Mellor v. Sidebottom*, 5 Ch. D. 342.

Mr. Mitchell in reply.—In *Cook v. Heynes* W.N. 1888. pg. 75 the Court dealt with the question summarily.

His Honor said I will consider the matter.

HIS HONOR on a subsequent day said :—The authorities I think show that Order XXXII r. 6. was not intended to apply to a case in which the admission is an admission of fact raising a difficult question of law. In this case difficult questions of law are raised and I think I should not exercise the discretion which I may have. I refuse the summons. Costs to be costs in the cause. I certify for counsel.

Solicitors for plaintiffs
for defendants *Crisp, Lewis, & Hedderwick.*

SITTINGS IN BANCO.

(Before Higinbotham, C.J., Williams & a'Beckett J.J.)

MUIR v. MUIR.

Nov. 18.

Marriage and Matrimonial Causes Statute 1864 *s.s.* 31 *and* 32—*Order of maintenance—A debt due to the husband is not goods or chattels within the meaning*

of section 32 and of the justices on making an order of maintenance, direct the seizure or appropriation of such debt in payment of the allowance. Such portion of their order will be set aside—When an order sought to be reviewed is bad on its face it is not necessary to have an affidavit that no depositions were taken at the hearing.

Order to review a decision of justices at Kensington. The complainant proceeded against the defendant her husband for maintenance, and the justices on hearing the evidence made an order fer the payment of 15 shillings a week for the maintenance of the complainant, and made a further order that the sum of L99 15s. 4d. due by the Victorian Railways Commissioners to the defendant be paid to the Clerk of Petty Sessions at Kensington and appropriated in payment of the allowance directed by the order to be paid. The decision of the justices was sought to be reviewed on the ground that the justices had no jurisdiction to make the latter part of their order, the debt due to the defendant not being 'goods or chattels' within the meaning of the 32nd. section of *Marriage and Matrimonial Causes Statute* 1864. The affidavit on which the order *nisi* was obtained did not state that no depositions were taken at the hearing.

Mr. Walsh to move the rule absolute.

Dr. Madden to show cause takes a preliminary objection:—The affidavit on which the rule was obtained is defective: it does not state that no depositions in writing were taken at the hearing; this was requisite in cases of prohibition, a similar procedure: either the depositions were produced or if none were taken that fact was set out in affidavit: *Regina v. Taylor*, 1 V.R. (L) 5, *and Regina v. Hare ex parte Watson*, 8 A.L.T. 173.

Mr. Walsh in reply.—The fact of depositions being taken or not does not affect this question: if it were necessary to go into the evidence, as in prohibition, it might be different. Here, we contend, the order is bad on its face; this case is similar to proceedings in an order to quash where a statement on affidavit that no depositions were taken was unnecessary. The question before the Court is, had the justices power to deal with a mere chose-in-action as "goods or chattels," and the evidence taken at the hearing is immaterial

Per Curiam.—We reserve our decision on the preliminary objection.

Dr. Madden to show cause.—The words "goods and chattels" used in section 32 are to be construed liberally and include debts. The statute is remedial and any other than a liberal construction would render it negatory. Money in the hands of the husband's attorney has been attached under this section: *Mitchell v. Mitchell*, 5 A.J.R. 44. He also referred to *Curtayne v. Mitchell*, 5 A.J.R. 434; *Jarman on Wills* 4th Ed. Vol. 1 page 751, and *Maxwell on Statutes* 2nd. Ed. page 27.

Mr. Walsh in reply:—*Mitchell v. Mitchell* was an unopposed application in Chambers and, if it applies, it is at variance with and must be considered as overruled by *Curtayne v. Mitchell* a later decision of the Full Court. In the latter case, *Barry, J.*, in delivering judgment, says—"It is quite out of the question to suppose that money in a bank to the credit of a customer is 'goods or chattels' of that customer in the sense in which those words are employed in this Act." In the present case the husband never had the money in his possession: it is a mere chose-in-action. Money in a parcel in the hands of a debtor with the creditor's name on it is no appropriation to the creditor so as to be levied on under the *Justices Act* (276) s. 118: *Reeves appellant Maginnis respondent* 2 V.R. (L) 187.

C.A.V.
2nd Dec.

HIGINBOTHAM, C.J., read following judgment of the Court:—This was an order to review an order of Justices made under Sections 31 and 32 of *The Marriage and Matrimonial Causes Statute* 1864, directing the defendant to pay to the Clerk of Petty Sessions, fifteen shillings weekly for the maintenance of his wife: and further, and upon proof that the defendant had deserted his wife and that there was due to him by the Victorian Railways Commissioners, on account of an allowance upon leaving the service, the sum of L99 15s. 4d., ordering the Railways Commissioners to pay the said sum to the Clerk of Petty Sessions to be applied by him in payment of the weekly sum directed to be paid. The ground of the order is that the Justices had no jurisdiction to order the said debt to be so dealt with, the same not being "goods or chattels" within the meaning of the statute. Justices have power to make an order authorizing and directing some person to seize the goods and chattels of the husband, but they have no power to make or enforce an order directed to the person in whose hands the moneys of the husband are to pay over the moneys. We do not decide that ear-marked coins or money are not goods or chattels and might not be seized by virtue of any order under the 32nd section. But a debtor cannot be compelled, by an order under this section, to convert a debt into coin: neither can a debtor nor a person with whom money is deposited for another be compelled to afford the person authorized to seize the opportunity of seizing the coin into which the debt may have been converted or the money deposited. The order of the Justices will be amended by striking out the portion objected to. The defendant having asked that the whole order should be reviewed must bear his own costs as we only reviewed the order in part. The question raised by the order to review does not involve the consideration of any of the evidence given before the Justices. The preliminary objections founded on the absence of an affidavit that no depositions were taken consequently fails.

WILLIAMS, J.:—I only wish to say a few words on the preliminary objection that the affidavit on which the order *nisi* was granted contained no statement that no depositions in writing were taken at the hearing and that no depositions have been produced. Upon the facts of this case the application is on all fours with an application under section 4 of Act No. 571, to quash an order bad on its face and on that

application it was not necessary to have an affidavit that no depositions were taken, it is only required in cases like prohibition where it is necessary for the Court to consider what evidence was given.

Solicitors for complainant, *McKean & Leonard*; solicitor for defendant, *Grave*.

(Before Williams Kerferd and a'Beckett J. J.)

THE GROSVENOR HOTEL CO. v. CASTELLANO.

Motion for new trial—Excessive damages—Principle on which new trial will be granted—Power of jury to give excessive damages—Bailey v. Hart 9 V.L.R. (L) 66 *commented on.*

This was a motion by the plaintiffs for a new trial. The plaintiffs are a company registered in Melbourne, but carrying on business in Sydney. The defendant had stopped for some time at their hotel, and then went to New Zealand without paying his bill leaving his luggage behind him. He returned to Victoria on his way to Sydney, when the plaintiffs commenced an action against him for the amount of his hotel bill and obtained from a judge of the Supreme Court here a writ of *capias* against him, under which he was arrested, and held to bail. He gave the bail but the writ was subsequently set aside as having been obtained on insufficient grounds, and by the suppression of some material facts. The defendant made a counter claim against the plaintiffs for damages for his having been maliciously arrested. At the trial the jury gave a verdict for the plaintiffs for part of their claim on the hotel bill, and for the defendant for £1,000 for his illegal arrest. The plaintiffs applied for a new trial on the counter claim on the ground, amongst others, that the damages against them were excessive.

Mr. Purves Q.C.. and *Mr Isaacs* for the appellants.

The damages are excessive. There was no proof of malice beyond what the jury might infer from want of reasonable and probable cause. In a case like this the Court will regard the excessive amount of the verdict as evidence of a mistake on the part of the jury and order a new trial. *Bailey* v. *Hart* 9 V.L.R. (L) 66. The Court has power to reduce the damages *Belt* v. *Lawes* 12 Q.B.D. 356.

Dr. Madden and *Mr. Hood* for the respondent.

To obtain a new trial for excessive damages it must be shewn that the jury were guilty of misconduct or committed some mistake, and this must be clear from the facts of the case as compared with the amount of the damages. The Court cannot say looking at all the circumstances of this case that the jury either acted erroneously or were guilty of misconduct. The Court will not direct a new trial merely because it thinks the damages excessive. The following cases were cited *Simpson* v. *Robinson* 12 Q.B. 511, *Metropolitan Railway Co.* v. *Wright* 11 App. Ca. 152, *Webster* v. *Friedeberg* 17 Q.B.D. 736, *Hewlett* v. *Crouchley* 5 Taunton 277, *Hoey* v. *Felton* 11 C.B.N.S. 142.

C.A.V. 2nd Dec.

WILLIAMS, J.—The original action was brought upon a hotel bill. The defendant made a counter claim for damages for malicious arrest. The jury, at the trial, gave the defendant L1,000 damages. The plaintiffs applied for a new trial on various grounds. The only ground on which we thought it necessary to reserve judgment was that the damages were excessive, the jury having given the defendant L1,000 damages in consequence of his arrest. I am free to admit that the damages given by the jury were very large indeed, and I do not think I should have taken the same view as to damages that the jury did. I may think the damages very high, much in excess of what I should have given, but I don't think the Court should interfere with the verdict under the circumstances of this case. The cases established the principle in actions of this kind that a jury is at liberty to look to all the circumstances of the case, look at the nature of the charge on which the person was arrested, at the amount of foundation which existed for his arrest, all the circumstances of the arrest, the place where, the time when, and the manner in which the arrest was effected, the circumstances which surrounded or were antecedent to it, and in addition to compensating the plaintiff they may punish the defendant for the high handed manner in which he acted. They may also punish him for the surreptitious or unfair way in which he conducted the proceedings which led to the arrest. It appears to me the jury may also look at the nature of the transactions for which the arrest was made, which was for non-payment of a hotel bill, and the reckless and most culpable way in which the law was set in motion. It was a case in which the most casual, trifling inquiry should have satisfied those who set the law in motion that the plaintiff was not going to abscond without paying his just debts. But, without making any inquiry, in the most reckless and culpable way they set the law in motion, and arrested him in the most public place, the hall of the Grand Hotel, which was thronged with people. I think the jury was also at liberty to look at the mode in which they got from a judge of the court the order for the arrest by the suppression of certain facts and the misrepresentation of others and take into consideration that when the real facts were brought before the judge he immediately set aside the order for arrest. Even on all these facts, I think, the damages high and large; still I do not think that the court ought to interfere with the verdict. A case of *Bailey v. Hart*, 9 V.L.R., was referred to as an authority for reducing damages. But there was a great deal to be read there between the lines which influenced the Court in doing what it did. I wrote the judgment of the Court in that case and there were peculiar circumstances in connection with it which do not appear in the report but which made the Court believe the jury were led into error and that case cannot be relied on as a precedent in a motion of this kind.

KERFERD, J.:—I concur.

A'BECKETT, J.—The cases cited bear out the law as laid down in *Mayne on Damages*—that it must appear from the amount of damages as compared with the facts of the case laid before the jury that the jury must have acted under the influence either of undue motives or of some gross error or misconception on the subject. I do not think that either of these conditions existed here, but I must say considering all the facts of this case and that the jury believed these facts, the damages were still extravagantly excessive. I think juries have the privilege of being extravagantly unreasonable in giving damages and the jury has exercised its privilege in this case to the fullest extent.

Motion dismissed with costs.

Solicitor, for appellants, *Sabelberg*; solicitors for for respondent, *Woolf & Destreé.*

(Before Higinbotham C.J. Williams & a'Beckett J.J.)

STEVENSON v. JAMES.

Action of trespass—Transfer of Land Statute (1866) *sec.* 49 *and Amending Acts* (1878) *sec.* 2 *and* (1885) *sec.* 41*—extinction of easement by abandonment—the omission of the Registrar of Titles to enter an easement as an encumbrance on the certificate of title of the servient tenement does not relieve such tenement of its liability—the question of abandonment of an easement is a question of intention and mere non-user even for over* 20 *years does not of itself constitute abandonment.*

Action for wrongful obstruction by defendant of a right of foot way and carriage way appurtenant to plaintiff's land. Questions reserved by *Williams* J. for the opinion of the Full Court.

The facts are fully set out in the judgment of the Court.

Mr. Box & Mr. Hood for the plaintiff.—The deeds objected to were properly admitted. They are more than 30 years old and were produced from the proper custody and were therefore admissible without any further proof *Elphinstone on the Interpretation of Deeds* pg. 119 Adverse possession does not affect the question of abandonment. Non-user must be joined with an intention to abandon. *Crossly v. Lightowler* L.R. 3 Eq. 219 and L.R. 2 Ch. 428; *Ward v. Ward* 7 Ex. 838. The position of the road is a question of fact; *Scott v. Shire of Eltham* 2 V.L.R (L) 98; *Small v. Glen* 6 V.L.R. (L) 154. The refusal of the Registrar to enter this easement on the defendant's certificate is no estoppel; if it had been entered it would have been conclusive evidence of its existence but as it is not entered the plaintiff must prove its existence any way he can.

Mr. Higgins with him *Mr. Purves Q.C. Dr. Madden and Mr. Bayles* for the defendant,—The deeds were admitted on insufficient proof. There is evidence of abandonment not rebutted. The certificate of title issued to the defendant shows no such easement as is claimed by the plaintiff and it should show it if it existed under the *Transfer of Land Amending Act* (1885) s. 41. That certificate makes the matter a *res judicata* and operates as an estoppel. The right of way claimed must be stated with certainty but here the way carved out by the owner is different from that claimed by the plaintiff.

The following authorities were referred to; *Taylor on Evidence* as to deeds and their production; *Ackroyd v. Smith* 10 C.B.N.S. 164; *exparte Johnson* 5 W.W. & A'B. (L) 55; *Archibald v. Archibald* 5 V.L.R. (E) 186; *Gale on Easements* 5th Ed. 357 (note); *Comyn's Digest*, 'chemin' D. 2 and 'grant' E. 14; and *Goddard on Easements* 3rd. Ed. 499 & 500.

Mr. Box in reply.—The entry of the encumbrance on the certificate of title is directory not mandatory; no one is to be deprived of his right merely because the Registrar of Titles fails to perform a directory statutory duty. *C.A.V.*

2nd. Dec.

HIGINBOTHAM C. J. read the following judgment of the Court:—

The question has been reserved for the opinion of the Full Court whether, upon the evidence rightly admitted in this case, the plaintiffs or the defendant are entitled to judgment. We have intimated in the course of the argument that certain deeds, bearing dates 7th and 8th June, 1839, 10th and 11th June, 1839, and 12th August, 1843, were, in our opinion, properly admitted in evidence. They were produced from the proper custody, but it was objected that some evidence should be given that they were, in fact, more than 30 years old. The dates they bear are, in the absence of anything to raise a doubt as to their genuineness, sufficient *prima facie* evidence for that purpose, and the deeds were admissible on production without further proof. The action is brought for the wrongful obstruction by the defendant of a right of footway and carriageway appurtenant to the plaintiff's land It has been stated for the plaintiff's that their claim is limited to a way half a chain in width only. The land of the plaintiffs and of the defendant was included in the Crown grant to Thomas Walker, dated January 31, 1839. The easement claimed by the plaintiffs was created by deeds of lease and release dated 7th and 8th June, 1839, between Thomas Walker and G. B. Smyth, in which the land released to the plaintiffs' predecessors in title was described as bounded on the north by a marked sectional line bearing west 29 chains from the north-eastern point of the said portion, and on the west by a line of road one chain in width, the use of which was thereby released and conveyed and bearing south from the north-western point to the Yarra Yarra River. The defendant's land situated on the west of

the plaintiffs' land, was described in the deed of conveyance dated March 9, 1846, to the defendant's predecessor in title as bounded on the east by a road 33ft wide dividing it from another portion of 1,260, sold by Walker to G. B. Smyth. For upwards of 40 years a line of fence has divided the land of the plaintiffs and of the defendant. The title given by the plaintiffs' title-deed would carry the northern boundary of their land 60 links further than the way or road claimed by them, and the western boundary would terminate at the south, at a point one chain and one link within the boundary of the plaintiffs' land. According to this admeasurement the chain road described by the plaintiffs' deed would run in an oblique direction, crossing the line of the fence, and ending on the northern side, at a point within the defendant's land, as shown by the fence, and at the southern side at a point within the plaintiffs' land, as shown by the fence. Both the parties have brought their land under the *Transfer of Land Statute*. The plaintiffs in November, 1886, and the defendant in September 1885, applied for and have obtained certificates of title in accordance with the boundary indicated by the fence. The deeds of both parties make a road, described in the one case as a road of a chain in width, and in the other of half a chain in width, the boundary between the lands of the parties. The position of the road is a question of fact, as to which the length of the northern line of boundary in the deeds is not conclusive. *Scott v Shire of Eltham*, 2 V.L.R. (L.), 98; *Small v. Glen*, 6 V.L.R. (L.), 154. The line of the fence is fixed by long user as well as by admissions. The certificates of titles of both parties must be taken, we think, to mark the line between the land of the plaintiffs and the land of the defendant; and the easement claimed by the plaintiffs, if it exists at all, exists over the land immediately adjoining, and on the westerly side of the fence. The plaintiffs' deed created the easement over a road a chain in width. The position of the road or the ground over which the easement exists has been determined by the acts and user of the parties and of their predecessors in title. The prevention of the user by the plaintiffs of that road at one point within the limit now claimed has also been proved and admitted. The first objection, and the one most strongly relied on, against the plaintiffs' proof of title to the easement has not been, in our opinion, sustained It has been also contended for the defendant that the easement, if created, has been extinguished by abandonment. The evidence goes to show that the plaintiffs and their predecessors have never had occasion to use the road, and that it never has been, in fact, used by them, or by anyone adversely to them, or by the public. The question of abandonment of a right of this kind is one of intention, to be decided on the facts of each particular case—*Crossley v. Lightowler*, L.R, 3 Eq. 279, and L.R. 2 ch. 478. Mere non user, even for a period longer than 20 years, unaccompanied by enjoyment adverse to the user, or by indications of an intention to abandon the right, does not constitute abandonment—*Ward v. Ward*, 7 ex. 838. In the present case the plaintiffs, while they do not appear to have given any indication of an intention to preserve their right by any distinct act prior to 1875, have never indicated an intention to abandon it. Ever since 1875 they have distinctly asserted their right. The evidence directed to show that the defendant's land was adversely used does not satisfy us that such user of the defendant's land was intended to be or was adverse to the plaintiffs' claim to use the road prior to 1875. We think that the plaintiffs' easement has not been lost by abandonment. *The Transfer of Land Statute* has been also relied on by the defendant. It is said that the refusal of the Commissioner of Titles to enter this easement on the defendant's certificate as an encumbrance is an adjudication by that officer that the easement does not exist. This argument rests we think on an erroneous view of the provisions of the statute. By the 49th section of the Transfer of Land Statute, the land included in a certificate shall be deemed to be subject to any easement acquired by enjoyment or user, or subsisting over or upon or affecting such land notwithstanding the same may not be specially noticed as an encumbrance on such certificate. By the latter act, No. 872, section 41, the registrar is required, notwithstanding the reservation in section 49 of easements subsisting over or upon or affecting any land comprised in a certificate, to specify upon any future certificate of such land and the duplicate thereof as an encumbrance affecting the same any subsisting easement over or upon or affecting the same which shall appear to have been created by any deed or writing. The omission by the Registrar to enter the easement as an encumbrance on the certificate of the servient tenement under this provision would not relieve the servient tenement of its liability. It would only show that no deed or writing had been brought before the registrar by which it appeared that the easement had been created. The act No. 610, section 2, provides that whenever a certificate of title shall contain a statement that the person named in the certificate is entitled to any easement therein specified, such statement shall be received in all courts of law and equity as conclusive evidence that he is so entitled. If the plaintiffs as owners of the dominant tenement had obtained a statement in the certificate under this provision the certificate would be conclusive. Not having obtained it, they have been compelled to establish their title by other means. But they are not prevented by the non-appearance of their title on defendant's certificate as an encumbrance from attempting to so establish it. We are of opinion that the defendant has failed upon all the objections, and that the plaintiffs are entitled to judgment in respect of a footway and carriageway half a chain wide and no more with damages assessed 1s. The plaintiffs will be excluded from claiming the other half-chain in their deeds by the former disclaimer of it they have now made.

Judgment for plaintiff for footway and carriageway half a chain wide and 1s. damages.

Solicitor for plaintiff *Campbell*; solicitor for defendant *Dixon*.

IN CHAMBERS.

(Before Kerferd, J.)

STEVENSON v. JAMES.

16th Dec.

Order in Council (9th June 1860)—Appeal to Privy Council—Points reserved—Where points are reserved for the decision of the Full Court and the Full Court has given its decision on such points the party aggrieved can appeal from such decision without waiting until the order embodying the decision has been passed.

Application on behalf of the defendant for leave to appeal to the Privy Council.

The plaintiff brought an action claiming damages for interference with and obstruction of a right-of-way over certain land, and at the trial certain questions were reserved for the opinion of the Full Court. The Full Court answered the questions reserved in favor of the plaintiff and assessed the damages. The plaintiff had not drawn up any order on the judgment of the Full Court and no motion had been made to the primary judge to enter judgment for the plaintiff.

Mr. Higgins in support.

Mr. *Box* to oppose. There is a preliminary objection to this application no order has been drawn up and as yet there is no final judgment until the order embodying the decision of the Full Court is passed there can be no appeal. *May v. Martin* 12 V.L.R. at pg. 120. (Here counsel was stopped.)

Mr. Higgins. The judgment of the Full Court is final and the appeal is against that judgment. The result of the finding of the Full Court on the points reserved absolutely disposes of the whole matter. The practical effect of the decision in *May v. Martin* is to show that the present application is in proper form and that if the defendant were to wait until the primary judge entered judgment he would be too late.

HIS HONOR. I think the contention of Mr. Higgins is the correct one. It is the right of any person aggrieved by the decision of the Full Court to appeal whether it be merely an interlocutory matter or whether it deals with a part of the action.

The application was subsequently postponed to enable the plaintiff to produce evidence as to the value of the matter in dispute.

Solicitors for plaintiff *Davies and Campbell*; for defendant, *J. E. Dixon.*

(Before Kerferd, J.)

GRANT v. RIDDLE D. MUNRO AND J. MUNRO.

17th Dec.

Rule of Supreme Court 1884 Order LVII r. 1—Interpleader—In an interpleader application a judgment debtor cannot set up the right of other persons to the goods seized in execution—Such persons should claim the goods themselves.

Sheriffs interpleader.

It appeared that the plaintiff recovered judgment against the defendants and issued execution thereon. The sheriff seized goods which were in the premises occupied by the defendant J. Munro. J. Munro thereupon gave notice to the sheriff that the goods so seized were not the property of the defendants or any of them but that they were the property of various owners who had merely stored them on his premises.

Mr. Moule for the execution creditor. There is a preliminary objection as to this claim. The claimant is the judgment debtor and does not assert any right to the goods himself but sets up the rights of other parties. It has been long established that a claimant cannot set up a "*jus-tertir*" to defeat the claim of an execution creditor, *Carne v. Price* 7 M. and W. 183. The claim should have been made by the owners of the property.

Mr. Woolcott in support. A similar claim was allowed in *Fenwick v. Laycock* 2, Q.B. 108.

HIS HONOR said. The case of *Fenwick v. Laycock* is not applicable to the present case and the claimant here cannot set up the rights of third parties for whom he has warehoused these goods; they should have made the claim themselves.

Solicitors, for execution creditor, *Grant* and *Son*; for claimant *J. S. Woolcott*; for Sheriff, *Klingender*, *Dickson* and *Kiddle.*

PROBATE JURISDICTION.

Before Hodges J.,

IN THE WILL OF J. P. BEAR DECEASED.

29th Nov.

Practice Probate—Interlineation in will—Affidavit that the alteration was made before the execution by the testator dispensed with owing to the special circumstances of the case.

Motion for grant of probate to the executors of the will of J. P. Bear deceased. There was an interlineation in the will; the initials of the testator and the witnesses were made in the margin opposite to the interlineation. The will was executed in England.

Higgins in support:—It is the practice in case of interlineations that evidence should be brought before the court showing that the interlineation was made before the execution of the will. It is now asked that the court will dispense with the usual affidavit as the change effected by the interlineation is unimportant, as the witnesses reside in England, and as the alteration is initialled by the testator and the witnesses.

HIS HONOR (after inspecting the will) granted the application.

Proctors *Attenborough Nunn & Smith.*

(Before Hodges J.,)

IN THE WILL OF THOS. PUGH DECEASED.

5th Dec.

No 222 sec 19—alteration—due execution—signature initials.

A testator altered his will after execution. Opposite the alteration the witnesses wrote their names in full but the testator placed his initials merely. Held, on the authority of Re Blewitt (5 L.R.P.D. 116), *that the alteration was duly executed.*

Application for a grant of probate of the will of Thomas Edward Pugh to George Withers and Thomas Rigby as executors according to the tenor reserving leave to Thomas Pugh and William James Sutcliffe the other executors to come in and prove. The testator died on the 11th November 1889 leaving a will dated the 22nd December 1888. The will contained the following clause "I appoint Thomas Pugh and Wm. "J. Sutcliffe of Liverpool my executors and pending "their instructions would ask Mr. J. S. Yuill of Sydney "and my brother-in-law Mr. J. Rigby of Melbourne "to take all necessary steps to realise my estate." The will was signed "Thomas E. Pugh." On the 10th Oct 1889 the testator altered the above quoted clause in the following manner; he struck out the letter and words of "S. Yuill of Sydney" and substituted the name "Withers." Opposite to this alteration appeared the initials (T.E.P.) of the testator and the name of J. Rigby and W. Rigby as witnesses.

Higgins in support, stated the facts. He contended that the alteration was duly executed and in support of his contention referred to the 19th section of the Wills Statute and to "*re Blewitt*" (5 L.R.P.D. 116).

HIS HONOR:—In this case the testator made a will by which he appointed certain persons executors; he also appointed two other persons who were to take all necessary steps to realize his estate. This, in my opinion, would make these two persons executors according to the tenor for he authorizes them to get in the estate and deal with it for a certain period. In these words he authorizes them to discharge the ordinary duties of executors and persons appointed to discharge the ordinary duties of executors are executors according to the tenor. After this will was so executed, the testator altered it by striking out the name of one of these persons and inserting the name or another. In the margin opposite this alteration two persons wrote their names as witnesses and the testator also put his initials opposite to it; the question is whether that alteration is properly executed so as to comply with the Wills Statute and entitle the applicants to obtain probate of the document in its altered form. That depends on the 19th section of the Wills Statute which provides that "no obliteration interlineation or "other alteration made in any will after the execution "thereof shall be valid or have any effect (except so "far as the words or effect of the will before such "alteration shall not be apparent) unless such alter-"ation shall be executed in like manner as hereinbefore "is required for the execution of the will." I need not, here, refer to this requirement. The section then goes on to provide, "but the will with such "alteration as part thereof shall be deemed to be duly "executed if the signature of the testator and the sub-"scription of the witnesses be made in the margin or "on some other part of the will opposite or near to "such alteration or at the foot or end of or opposite "to a memorandum referring to such alteration and "written at the end or some other part of the will." So the question is whether the writing of the two persons names in the margin and the initials of the testator opposite is a sufficient compliance with the section. At first I doubted whether the writing of the initials could be called a signature, inasmuch as it was not the way in which the testator ordinarily signed his name, if it was not the way in which he executed the will; but the statute does not say that it is to be duly executed if the testator signed in his usual way but simply if the signature is opposite the alteration the case referred to by *Mr. Higgins* decides that the signature may be made by initials. That case, too, was contested, and was tried before the President of the Probate Court and he then decided that although the testator signs the will by writing his name in full yet it is a proper signature to the alteration if he signs by his initials only. That being so, there is, in this case a sufficient signature within the meaning of the section. I shall therefore grant probate to the two applicants until the persons appointed afterwards so to speak come in and prove.

Proctors; *Klingender Dickson & Kiddle.*

SUPREME COURT SITTINGS.

(Before Hodges J.,)

SPIER V. THORNE.

20th 21st 22nd Nov

Practice.—Trial.—Administration Action—. Wilful default—Reference to Chambers.

In an action for administration it is competent for the court to allow a case of wilful default though not stated in the pleadings to be raised at any time during the action; it will not direct such an account upon suspicious circumstances however strong but will require distinct evidence.

Action by W. H. Spier and R. Crawford (trading as Spier and Crawford) against Marian Thorne and W. H. Leacy to have administration of estate of one A. H. Thorne deceased and other relief. The facts are as follows:—A. H. Thorne died on 27th Feb. 1889 and probate of his will was granted to the defendant W. M. Leacy. The defendant Marian Thorne was the widow of the testator and sole beneficiary under the will. At the time of his death the testator was largely indebted to the plaintiffs. The testator had been the keeper of an hotel at Benalla of which he also held the license. He held the hotel under lease from one

Maxwell which however had expired shortly before his death; on its expiration Maxwell had agreed (as was alleged but not proved) with the plaintiffs (who held a bill of sale over the chattels in the hotel) and Thorne that if the plaintiffs would pay to himself (Maxwell) the rent in arrears, he would grant to Thorne a further lease for 3 years. The testator died, however, before this arrangement could be carried into effect; the plaintiffs subsequently paid the arrears of rent to Maxwell and Maxwell executed a lease to the defendant Marian Thorne. Shortly afterwards Marian Thorne obtained a transfer of the license into her own name. This last named defendant, thereupon, claimed to hold the lease and the license in her own right and thereby necessitated the present action. The plaintiff claimed (1) Administration of the testator's estate (2) A Declaration that the lease and license formed part of the testator's estate (3) Accounts and Inquiries &c. At the close of their case the plaintiffs asked and obtained leave to add to their claim a statement in the following terms:—"In the alternative the plaintiff "will contend that the defendant W. M. Leacy was "guilty of wilful default in allowing the defendant "Marian Thorne to obtain the said lease and license "without obtaining any benefit from the estate of "the testator and that in taking the accounts here-"inafter claimed he should be charged with the value "of the said lease and license." There was no evidence to show what was the nature of the tenancy subsisting either in Thorne or his executor during the interval of time between the expiration of the old lease and the granting of the new one.

Isaacs for the defendants: An executor is simply a gratuitous bailee, *Job v. Job* (6 C.D. 562) *Barber v. Mackrell* (12 C.D. at 534. It is, therefore, not liable except in cases of wilful default. There is no evidence of wilful default as during his possession he was nothing more than a tenant at will; there is no evidence that he, while representing the estate, was a tenant from year to year; consequently the landlord could not have been precluded by Leacy from granting, immediately, a lease to whomsoever he wished; there is no evidence of any agreement binding Maxwell to grant a lease to the testator. There is merely a case of suspicion against Leacy. The Court will not direct an enquiry for wilful default in such a case. *Anthoness v. Anderson* (14 V.L.R. 127) was also referred to as to the nature of a license.

Goldsmith for the plaintiff contended that the evidence was sufficiently strong to warrant the direction of an account on the footing of wilful default, *Smith v. Armitage* (24 C.D. 727); the executor should not have permitted the transfer of the license. There was clearly collusion between the defendants.

His Honor:—In this case the plaintiffs are the creditors of a man named Thorne who died in February of this year and at the time of his death was carrying on the business of an hotelkeeper at Benalla. The defendants are the widow of Thorne and the executor and the plaintiffs claimed against these defendants to have the ordinary administration decree and a declaration that the license which has been transferred to the defendant Marian Thorne forms part of the estate of the testator and is liable for the payments of his debts and that the lease is also part of the testator's estate and the statement of claim has been amended by adding an alternative to the effect that the defendant executor has been guilty of wilful default in allowing the defendant Marian Thorne to obtain the lease and license and that he should be charged with the value of the lease and license in taking the accounts. As to the ordinary administration decree I need not say anything as the plaintiff's right to it is admitted. The real question is as to whether this lease and also the license belong to the testator's estate. The contention that they did form part of the testator's estate, was, in the statements of claim, based on the agreement alleged to have been made between the plaintiffs the deceased Thorne and his landlord and the carrying out, on the testator's death, of that agreement practically by the plaintiffs and the testator's landlord. In relation to this matter the plaintiff gave his evidence in a thoroughly straightforward manner and he told a tale which was entirely unvarnished but the evidence did not prove the agreement as alleged and it appears upon his evidence that there had been no such agreement as stated in the 7th paragraph of the claim. He acted as he did, voluntarily, on a suggestion from the landlord's solicitor that the landlord would see right done between the parties but unfortunately the landlord has not done so. He appears to have been desirous of doing so but he has not done so. He granted the lease not to the executor but to the widow, and thereupon, also, the executor consented to the defendant Thorne obtaining the license; the lease being once got, the license became practically valueless in the hands of any other person than the lessee and it would be almost the executor's duty to facilitate matters on behalf of the owner of the lease. Consequently I do not think I can now make the declaration asked for or decree on account on the footing of wilful default. I entertain no doubt that these two defendants acted as they have done with the view of robbing the creditors of the testator and benefitting the widow. Still I cannot say that there is any legal evidence of it. The plaintiffs' advisers do not appear to have brought the necessary witnesses here and all the evidence before me I cannot find that the executor has been guilty of wilful default. I have no material before me on which to determine whether or not the testator occupied the position of a yearly tenant before his death. If he was in the position of a yearly tenant the executor would undoubtedly be guilty of wilful default in parting with the license which would in that event be clearly valuable. But I do not know whether he was not merely a tenant at will. And if the testator was merely a tenant at will the executor would not be guilty of wilful default in not obtaining the lease, and if not guilty of wilful default in not obtaining the lease, it follows as a matter of course that he was not guilty of wilful default as regards the license. I shall make an order for the usual accounts to be taken, each party to abide their own

costs up to date; reserve liberty to apply, further consideration and future costs.

Solicitors—For plaintiffs, *Prendergast*; for defendants, *Isaacs*.

(Before Hodges, J.)

RE THE STANDARD INVESTMENT CO. LIMITED,

Oct. 31, Nov. 12, 13, 14, 27, Dec. 2.

No. 190 *s.s.* 83, 124—*Company—Voluntary winding up—Removal of Liquidator—Locus standi—"Due Cause."*

A company was being wound up voluntarily, one C.P.W. being the liquidator, owing to certain alleged acts of omission and commission on the part of C.P.W. a large majority of the contributiories, i.e. of the parties interested in the liquidation, were desirous that C.P.W. should be removed and one T. M. appointed in his place. It was urged that as the applicants were "in default" they could not make the application it was also urged that T. M. could not be appointed liquidator inasmuch as he was a debtor of the Company.

Held, that, to read in the words "not in default" after the word "contributory" in sec. 124 *would be to supplement and not to interpret the Act.*

Held, that the mere fact that a person was indebted to a Company was not, per se, an absolute bar to his being appointed liquidator.

Held, that the expression "due cause" in sec. 124 *is to be measured by the real and substantial interests of the liquidation, i.e. by the real and substantial interests of the parties interested in the liquidation.*

Application under section 124 of the "*Companies Statute* 1864" to remove one liquidator and appoint another to act in his place. The affidavit filed on behalf of the applicants stated (*inter alia*) as follows:—In December 1888 a committee of shareholders was appointed to investigate the affairs of the "Royal Standard Investment Co. Limited," the result of the investigations went to show that the Company had been formed merely for the purpose of taking over from the directors and their friends property which they possessed and out of which they intended making secret profits at the expense of the shareholders; several meetings of the shareholders were held during the months of January and February 1889 and at these meetings the directors admitted practically the truth of the matters alleged against them; in February it was finally resolved that the Company should be wound up voluntarily; before this final resolution the directors satisfied the shareholders that they had secured agreements to cancel all the contracts entered into by them for the purchase of lands except a contract with one Leschkam and a contract with one Glassford; on the 7th March one C. P. Williams was appointed liquidator. The affidavit went on to state various acts of commission and omission by C.P. Williams which induced the applicants to believe that the liquidation was not being conducted in a proper manner. The applicants accordingly requested C. P. Williams to permit one Thompson Moore to act conjointly with him, the last mentioned person being prepared to give his services gratuitously. This proposal, however, appears to have been rejected by C. P. Williams and application was, accordingly made to the court for an order removing C. P. Williams and substituting Thompson Moore.

Hood (with him *Higgins* and *Isaacs*) on behalf of the applicants.—The application is under section 124 of the Act. The liquidator should be removed as it is for the interest of the parties interested; *Findley on Company Law* (5th Ed. 903, *exparte Charlesworth* (36 C.D. 299); *In re Association of Land Financier* (10 C.D. 269): *In re British National Association* (L.R. 14 Eq. 492): *In re Mutual Live Stock* (12 V.L.R. 767, 781.)

Goldsmith (with him *Topp*) contra.

[HIS HONOR adjourned the hearing in order that a meeting of creditors and contributories might be held under sec. 83 of the Act with the view of ascertaining what their wishes might be in relation to the application. A meeting was accordingly held and a report drawn up; by this report it appeared that the creditors took up a neutral position, but that a large majority of the contributories were in favor of the application. The matter came on for discussion again on November 27th.]

Goldsmith, raised an objection:—the applicants are in default and cannot maintain this application; *Re Norwich &c. Society, re Hesketh* (49 L.T. Ch. 187; *Re the Steam Stoker Co.* (L.R. 19 Eq. 416); *Re Provincial and Suburban Bank* (5 V.L.R. (E) 159).

Hood; The cases referred to have been overruled by *Re the Diamond Fuel Company* (13 C.D. 400); *Re Norwich &c. Societg* (49 L.J. Ch. 187) was decided by James L. J. when he was V.C.; *Re the Steam Stoker Co.* (L.R. 19 Eq. 416) was decided by Bacon V.C. on the authority of the previous case; and in *Re the Diamond Fuel Company* (13 C.D. 400) James, L.J. states that when he decided the *Re Norwich &c. Society* case he was supplementing rather than interpreting the Act.

C.A.V.

HIS HONOR:—This is an application under the 124 section of the Companies Statute 1864, to remove Mr. C P. Williams, and to appoint Mr. Thompson Moore as liquidator to the company in his place. The first objection taken was in the nature of a preliminary objection, but it was raised after the case had been substantially argued. It was that the persons applying could not be applicants, inasmuch as they were in default, and a case in 49 Law Journal was relied upon in support of that contention. Before dealing with the objection on the authorities I propose to look at the section and see whether, apart from authority, that objection is a good one on the construction of the act. Section 124 does not state in express terms by whom the applic-

ation has to be made, or any qualification which an applicant must possess. In the earlier part of the section it might be inferred that it was to be by a contributory, but beyond that there is nothing in the section which indicates by whom it is to be made, or what are the qualifications of an applicant. Under these circumstances it would seem to be adding words to the section to say that the application has to be made by a contributory who was not in default. As this is so, on the construction of the act alone, I should say that such a view could not be supported. I do not mean to say that where a person was disputing his liability that might not be a very good reason for refusing to hear him when he desired to interfere in the affairs of the company. I do not mean to say that in a case like that in the Law Journal *Re Norwich &c. Socy.* 49 L.J. Ch. 187, the Court would not refuse to hear a person who said that he was a contributory at the present time, but was applying to have his name removed from the list, or that I would not decline to hear him until that was disposed of. I do not mean to say that under circumstances of that kind the Court would hear an applicant, but the mere circumstance that he was in default would not, in his opinion, be an answer to him on the construction of the section and apart from the authorities. Looking at the authorities, the main case relied upon by the liquidator was Hesketh's case. In that case Vice Chancellor Bacon refused to make absolute a rule for the removal of a liquidator, upon the ground that the person applying, who was a contributory, was in default and as he put it, the applicant called himself a contributory and in the same breath told him he was not, and intended to take steps to dispute his character of contributory. If the applicants were disputing that they were contributories, I might decline to hear them. So without saying whether that case should be relied upon as good law at the present time, I should be inclined to yield to it and decline to hear such a person. It was said in the head note to that case that the same rule applied to the removal of a liquidator as to a person presenting a petition for winding up a company. In that case only two authorities were cited in support of the objection. The first was a case of *The European Life Assurance Association*, L.R., 10 Eq. 403, in which James, the then Vice Chancellor dismissed a petition on the ground that the person presenting it had not paid the calls that were in arrear. That case was followed in a case in L.R. 19 Eq. 416 by Bacon, V.C. The foundation appeared to be that decision of James, V.C. In a later case of the *Diamond Fuel Company*, 13 C.D., James, V.C., who had then become a Lord Justice, considered that he was wrong in that former case, which was the foundation of the other authorities, and that he had been rather supplementing the act than interpreting it, and in that case overruled the earlier decisions. That being a decision of the Court of Appeal it is certainly binding on me and gets rid of the only difficulty I should have felt from the authorities cited. That case also appears to be in accordance with the decisions earlier than Hesketh's case, which were decided under the previous act. That act was in regard to these sections similar to the present act, though the section under which *in re The Sherwood Loan Company* 1 Sim. N.S. 165, was decided was in slightly different phraseology. In that case the V.C. said:—"With regard to the petitioner not being entitled to apply for the order, it was said that from the state of the accounts it would be shown that, he having had the benefit of a loan of £50, was greatly in arrear to the society with regard to the payments which he was bound by the rules and regulations to make on account of that loan, and that those arrears more than exhausted his whole interest, and therefore he was no longer entitled to any portion of the property of the company. But I do not think that signifies, because the petition, according to the provisions of the *Winding-up Act* of 1848, is to be presented by any person being or claiming to be a contributory." Mr. Thompson Moore claimed to be a contributory, and that was enough, but he not only claimed to be a contributory, but he was one. Therefore he thought he was entitled to make the application. The next objection was that a debtor to the company could not be appointed liquidator. No authority directly supporting that proposition had been cited, and he thought the language used, *in re Provincial and Suburban Bank*, 5 V.L.R. (E.,) 159, was inconsistent with the idea that the mere fact that a person is indebted to the company was a bar to his being appointed a liquidator, because in that case a person whom it was desired to have appointed was not only a debtor to the bank, but one whose transactions with the bank were in dispute, and it was rather put upon the ground that the transactions were in dispute than that he was a debtor. At page 178 Molesworth, J, said:—"Mason was challenged at the meeting as unfit to be a liquidator, being a debtor to the company. He did not answer that challenge distinctly. It was renewed at the hearing before me more distinctly, and on affidavit, that after the suspension of the bank Mason was indebted to it on current account over £200, and in a sum over £800 on a dishonoured acceptance, for which he had given security not worth more than £300. In answer to this Mason's counsel stated that the acceptance was joint, and the bank owed him more than its amount. The matter stood for his explanatory affidavit which he made stating that he had incurred the £800 bill for the accommodation of another, and that the security was, as he believed, worth more than £300." If his being a debtor was sufficient there was no necessity for the cause standing over for an explanatory affidavit.

"This, at all events, showed him to be an embarrassed man, and a debtor to the bank. The first duty to liquidators will be to enforce the payment of his and of all debts due to the bank, and I think him an unfit person, and could not appoint him at the wish of any majority of creditors against a minority."

I do not think the fact that Mr. Moore is indebted in the small sum of £62 10s. is an absolute bar to his appointment, but I think I ought to impose it as a condition upon him before appointing him that he should

pay that £62 10s., because if the money had to be gathered in I think that the liquidator should not have the temptation of calling in the other moneys first and his own last. The real matter in dispute between the parties is as to whether or not I ought to remove Mr. Williams and appoint Mr. Thompson Moore liquidator in his place. The authority of the Court to remove a liquidator depended "on due cause" being shown. The first matter to be considered is therefore, what is the meaning of the expression "due cause." Bowen, L.J. in *re Adam Eyton Limited*, 36 C.D. 306, said :—"To my mind the Lord Justice has correctly intimated that the due cause is to be measured by reference to the real substantial honest interests of the liquidation, and to the purpose for which the liquidator is appointed. Of course fair play to the liquidator himself is not to be left out of sight, but the measure of due cause is the substantial and real interest of the liquidation." And Cotton L.J. in the same case said :—"If the Court is satisfied, on the evidence before them, that it is against the interest of the liquidation, by which I mean all those who are interested in the company being liquidated, that a particular person should be made liquidator, then the Court has power to remove the present liquidator, and, of course, then to appoint some other person in his place." I have therefore to determine in this case whether it is for the substantial and real interests of the liquidation that Mr. Williams should be removed and Mr. Thompson Moore appointed—*i.e.*, whether it is for the substantial and real interests of the persons interested in the winding up that the order should be made. The application is supported by an overwhelming majority of the shareholders. The creditors of the company have substantially stood aside, and it was contended that the reason of their having done so was that they were sure to get their money in any case, and Mr. Goldsmith frankly admitted that that was so, that they could get their money at any moment. So that the only persons really interested in this case were the shareholders, and, as the application was made by an overwhelming majority of the only persons who had any real interest in the winding up of this company. I think I should grant the application. I have had some doubt whether that of itself was not within the authorities "due cause"—in other words, whether I should not allow these persons to manage their own business by their own nominee. That, certainly, is borne out by some of the language in a case to which I was referred—*In re Association of Land Financiers*, 10 C.D. 272. In that case it did not happen to be the shareholders who were interested, as the capital was all called up, and, consequently they had no interest whatever. The secured creditors were amply secured, and therefore the only persons interested were the unsecured creditors. Malins, V.C. after saying that an overwhelming majority of the unsecured creditors was against the appointment of Mr. Waddell, on the ground of expense, and that they thought that the assets would be better realised by tradesmen and merchants, said :—

"It has been much pressed upon me that a merchant or tradesman cannot be competent to do such business, but I altogether dissent, and I can see no reason why they should not with proper assistance, sell this property and get in the debts and pay the creditors and deal with the assets in a proper manner," And then he says :—"If I am satisfied that Mr. Sims and Mr. Standing can well perform these duties, and will perform them gratuitously, so as to save the usual expense of an official liquidator, and are supported by those whose interests they are to represent, why should they not be appointed? If this had been a bankruptcy, the creditors and not the Court would have selected the trustee or assignee, and when the creditors have by a very large majority desired the appointment of these two gentlemen, I think I ought to accede to the motion. The creditors have a right to the management of their own affairs, not of course, personally, as they are too numerous, but by their representatives, and they choose these two gentlemen."

So that the language there might seem to say that a large majority might choose these persons: Though that is to me a very strong ground, I do not propose to rely on it only. There was another matter which influences me. This is not like an ordinary liquidation The liquidator had to negotiate at the outset with certain persons who were making claims in regard to certain contracts about which there was the greatest possible doubt as to whether they were enforceable or not. He had to see whether they were to be rescinded. I offer no opinion as to the setting aside of the contracts. I do not desire to prejudice the case of Mr. Glassford, who is not before me, by what I am saying and I do not think it would prejudice. I only say that, on the facts before me, it seems as if there ought to be something done to prevent that contract being enforced; that the company ought to get something out of it instead of having to lose by it, and I think that could be better done by a business man than by a person whose occupation was such as Mr. Williams had been. It was a matter which I think a business man would better deal with than Mr. Williams would. I say that not only from his calling, but from his manner in the witness box, his style and manner was not likely to carry weight in difficult negotiations. I also thought it would be more cheaply managed by Mr. Moore. There was another matter which influences me. In negotiations of this kind it is extremely important that persons conducting them should have an interest in them, and that his interest and his duty should be on the same side. Mr. Moore's would be on the same side, but Mr. Williams interest and his duty are in most direct conflict. It is to his interest that he should have to pay every farthing to the London Chartered Bank, to Glassford, to M'Mahon, and others, because the more he pays the more money he has to get from the shareholders, and the more he gets from the shareholders the greater is his commission. I, therefore, think I ought to make the order. There is one thing that troubles me, which is as to the proper way to recompense Mr. Williams for his trouble up to the present, and as to the power I have to order remuneration to be ascertained in any special way. But as I consider that in making the order I am acting for the benefit of the Company, I will make it in this way, that on Mr. Moore paying to Mr. Williams such sum as the chief clerk should ascertain

to be a fair remuneration for his services Mr. Moore be appointed. If Mr. Williams objects to that I will give him 5 per cent. on the money received up to the present. Mr. Moore would be recouped by the company. I should say in making the order, that I do not reflect in any way on Mr. Williams omissions or commissions. I do not think it necessary to decide anything with regard to them. I base my decision on the grounds I have stated in my judgment. I direct the costs of both sides to come out of the company's funds.

Order made for the removal of Mr. Williams and the appointment of Mr. Thompson Moore as liquidator, the costs to be paid by the company, and Mr. Williams to receive such commission as might be awarded by the chief clerk, or, or if he preferred it, a commission of 5 per cent. on the money already received.

Solicitors for applicants, *Blake & Riggall*; against, *Braham & Piranı.*

IN THE SUPREME COURT OF TASMANIA.

(IN CHAMBERS.)

(Before the Chief Justice.)

DERRY TIN MINING COMPANY (appellants). v. SOUTH GARIBALDI TIN MINING COMPANY (Respondents.)

27th May 1889.

Rights of riparian owners as to use of water—Diversion of water.

The facts are as follows :—A complaint was on 15th March laid alleging that the Derry Tin Mining Coy. did from the 4th March and up to the time of hearing unlawfully trespass on the claim of the South Garibaldi Tin Mining Company by taking and diverting water from the Wyniford river that flowed through their claim and which was required by them for the purpose of carrying on mining operations. After hearing evidence an order was made directing the Derry Company to discontinue the trespass. The Derry Coy. appealed against this order on the grounds that the finding was contrary to law and against the weight of evidence.

Attorney General for appellants; *Clemons* for respondents.

THE CHIEF JUSTICE.—This is an appeal from the decision of the commissioner, who granted an order restraining the Derry Co. from continuing to direct a flow of water from the Wyniford River. The Garibalbi has a lease dated July 1, 1881, of land fronting on the Wyniford River, and as lessees, the company by common law became *prima facie* entitled to the unimpeded flow of the water of the river in its natural course, and to its reasonable enjoyment as it passed by and over the land occupied by them, as a natural incident to their occupation. Every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, for the reasonable use of the water for his domestic purposes and for his cattle, and this without regard to the effect which such use may have in case of a deficiency upon proprietors lower down the stream. But, further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided that he does not thereby interfere with the rights of other proprietors either above or below him. Subject to this condition, he may dam up the stream for the purpose of a mill, or divert the water for the purpose of irrigation; but he has no right to interrupt the regular flow of the stream if he thereby interferes with the lawful use of the water by other proprietors and inflicts on them a sensible injury. If the user of the water by the riparian proprietor goes beyond his natural right, it matters not how much the plaintiff (whose natural right is affected by such user) has used the water, or whether he has ever used it at all, in either case his right is equally invaded, the law will protect him. These then are the common law rights of a riparian proprietor as far as they need be stated for the purposes of the present case, and upon these the plaintiff company relies. The defendant company's property, is situated on the same river above the plaintiffs, and on the 4th of March last the defendants diverted about eight sluice-heads of water from and did not return it to the river, leaving about half a sluice-head to flow on towards plaintiff's property, so that the bed of the river, according to the finding of the Commissioner was virtually dry. The defendants claimed to divert 10 sluice-heads from the river by a grant from the Crown under section 47 of 47 Vic., No 10; but that section expressly provides that such a grant shall not prejudice the existing rights of any person to the reasonable use of the water flowing in a natural bed or channel through or along the margin of land belonging to or occupied by him. I have set out what are the rights of the plaintiffs as riparian proprietors, and the subsequent grant of the right to take 10 sluice-heads cannot in any way diminish or prejudice the rights of the plaintiffs. The act of the defendants in virtually diverting the whole stream was clearly an unjustifiable invasion of their rights, and the judgment of the Commissioner must be affirmed with costs. It was said that other riparian proprietors were diverting water above the defendant company's land, if they were doing so to an unreasonable extent, according to the law then they would be liable for their actions to both the defendant and plaintiffs, but this could not relieve defendants from their share of liability for emptying the river of the natural stream by the time its course reached the plaintiff's property.

(IN EQUITY.)

POWELL AND ANOR. v. HEPBURN AND OTHERS.

20th Sept. and Oct. 3rd 1889.

Settled Land Act 1884 (48 *Vic. No.* 10)—*Application*

to have lease granted under Act declared void and ordered to be given up to be cancelled—The Statute of Limitations (9 *Geo.* 3 *c.* 16) *held to apply to Tasmania although not expressly extended to the Colony.*

Ritchie and Mugliston for plaintiffs.

The Solicitor General for defendants.

The facts appear sufficiently from the judgment of the Court which was delivered by the Chief Justice.

The CHIEF JUSTICE:—This is a suit brought by David Powell and James Hepburn against Mary Ann Hepburn, James Grant, Wm. Martin, J. G. S. Fawns, and Steel Trail to have a lease purporting to be granted by the defendant Mary Ann Hepburn to the defendants Fawns and Traill declared void and ordered to be delivered up to be cancelled. The bill also contains a prayer that the defendants Fawns and Traill may be restrained from acting under the provisions of the lease. The facts are shortly as follows:—The late Captain Hepburn being in occupation of certain land held under a location order from the Crown, dated February 13, 1828, by deed dated February 2, 1852, leased a portion of such land to his son, James Hepburn, one of the plaintiffs, for the term of 38 years. Captain Hepburn died on February 21, 1862, having first made his will, under the provisions of which his daughter, the defendant Mary Ann Hepburn, is now a tenant for life of the said land, and the reversion, which was by the will limited to two of the testator's grandsons, was mortgaged by them, and was afterwards, on default being made in payment of the money thereby secured, sold by the mortgagee to the plaintiff David Powell, who now holds the same. In the beginning of the year 1888 the defendants John George Sydney Fawns and Steel Traill entered into negotiations with the tenant for life for a lease to them of the said land for the purpose of mining, under the provisions of The Settled Land Act, 1884. The plaintiff Powell, having become aware of these negotiations, caused his solicitors to write a letter dated March 5, 1888, to the defendants James Grant and William Martin as trustees of the will of the said testator objecting to the lease being granted for the reasons therein set forth. On August 3, 1888, by deed made between the defendants Mary Ann Hepburn of the first part, the defendants Grant and Martin of the second part, and the defendants Fawns and Traill of the third part, the defendant Mary Ann Hepburn as tenant for life purported to demise all mines, etc., upon the said land to the defendants Fawns and Traill for the term of 21 years. Thereupon the plaintiffs, Powell and James Hepburn, commenced this suit to have the lease declared void and cancelled, and to restrain the defendants, Fawns and Traill from acting under it. The bill was filed on December 20, 1888, and the defendants, Fawns and Traill, finding that the provisions of the Settled Land Act, 1884, had not been strictly followed, and that therefore the lease was invalid, caused their solicitors to write to the plaintiff's solicitor on January 5, 1889, as follows:—"Our clients, the defendants, Messrs. Fawns and Traill have instructed us to make the following offer:—They will, with the consent of all parties, surrender the lease and pay your client's costs to date, as between party and party, if your client will stay proceedings. If this offer is not accepted our clients will consent to a decree, and contest the question of costs. This offer is, of course, made without prejudice, but reserving the right in case the offer is not accepted to make use of it on the question of costs." This was an offer to give the plaintiffs all they were entitled to, but they would not discontinue the proceedings unless they received costs as between solicitor and client. This was demanding more than they were entitled to, and the suit proceeded to hearing. At the hearing of the cause the defendants admitted that the lease was not in conformity with the provisions of the Settled Lands Act, 1884, and therefore could not bind the interest of the plaintiff Powell as remainder man, nor could it affect the interest of the plaintiff James Hepburn during the few remaining months of his term of 38 years, but it was submitted that as it appeared upon the proceedings that the land in question had never been granted by the Crown, and as therefore both the property and possession in law were in the Crown, and as the Court was bound to take notice of this, the bill must be dismissed, and the plaintiffs must be left to apply to this Court in its "Claims to grants of Land" jurisdiction to secure any rights they may have. To this the plaintiffs replied that the location order was issued to Captain Hepburn more than 60 years before the commencement of this suit and that Captain Hepburn and those claiming under him had held possession, in fact, of the land in question during that period, and that, therefore, the Crown's remedy by writ of intrusion was barred by statute 9, Geo. 3 c. 16. That Act takes away the right of suit of the Crown, or of those claiming under the Crown, against such as have held an adverse possession against it for 60 years. *Goodtitle v. Baldwin*, 11 East. 495. The 9th Geo. 3, c. 16 has never been expressly extended to Tasmania, and it was contended that it did not come within the scope of the Huskisson Act, 9 Geo. IV., c. 83, which provides (sec. 24) that all laws in force in England at the passing of that Act (July 25, 1828) shall be applied, so far as the same can be applied within the colony." The question, then is, can this Act be "reasonably" (Wicker and Hume, 7 H. Lds cases) applied within Tasmania? It is a Statute of Limitations, on which it is said in the old case of *Green v. Rivett*, 2 Salk, 422, "the security of all men depends." As to other statutes imposing limitations upon the bringing of suits, that of 21 Jac. 1, c. 16, was never expressly extended to Tasmania, but has always been held to apply here by virtue of the Huskisson Act and Ld. Tenterden's Act, 9 Geo. IV., c. 14 (amongst other things) amending the Act of James was expressly extended to Tasmania by an Act of the Legislative Council, 4 Wm. IV., No. 12, which recites that the 9th Geo. IV., c. 14, is not at present in force within this island, by reason that it was not actually in operation in England at the time of the passing of the Huskisson Act, July 25, 1828. The 9th George IV., c. 14,

although it received the Royal Assent on May 9, 1828, and so before the passing of the Huskisson Act, did not come into force till January 1, 1829. There is also a statute 21 Jac. 1, c. 14, to enable the subject, where the Crown has been out of possession for more than 20 years, to plead the general issue to a writ of intrusion brought by the Crown, and to retain possession till the title has been tried and adjudged to the Crown. In 1842 the Legislative Council by Act 4 Vic. No. 17, declared that this statute did not apply to the colony. The Act, 4 Vic. No. 17, was disallowed by the Queen, and enclosed in the despatch disallowing the Act, I find a joint opinion of Sir Fred. Pollock and Sir W. Follett. They write on November 1, 1842 :—"We are not aware of any particular state of circumstances affecting the colony of Van Dieman's Land, which should deprive Her Majesty's subjects in that colony of an advantage possessed by all the subjects of Her Majesty in England, and in the other dominions of the Crown where the law of England prevails." The Supreme Court of New South Wales in the case of *Attorney General v. Brown*, 2 S.C.R. app. 30 (I quote from the digest 223) is said to have doubted whether the 21 Jac. 1, c. 14, extended to that colony. The Law Officers and Legislature of this colony seem to have considered that it would apply, and the law officers of England seem to have entertained no doubt that it extended to this colony. It is an Act curtailing the prerogative of the Sovereign in the procedure upon writs of intrusion after the Crown has been out of possession for a certain time, and the 9th Geo. 4 c. 16 goes a step further as to procedure, and forbids a writ of intrusion to lie after the Crown has been out of possession for 60 years. The two statutes stand *in para materiâ*. The Court is of opinion that the Stat. 9, Geo 3, c. 16, barring the Crown's right to a writ of intrusion when it has been out of possession in fact for 60 years, can be reasonably applied to this colony, and is, therefore, extended by the operation of the Huskisson Act, and this opinion is supported by the reference made to those cognate Acts which have been held to apply to the colony. It was also contended that even if no writ of intrusion would now lie, it did not follow that the land in question could be the subject matter of a suit before this Court, otherwise than in its "Claims to grants of land jurisdiction." Lord St. Leonards in the last edition of his "Vendors and Purchasers," p. 389 says, "A purchaser will be compelled to take a title depending upon . . . The Statute of Limitations, and the same rule applies when the Crown is barred by the 'Nullum Tempus Act' 9 Geo. 3, c. 16." A suit for specific performance would, therefore, lie on such a title to ungranted land, and this court has, therefore, jurisdiction to deal with it when exercising its ordinary jurisdiction in equity. There is one other objection to be dealt with, viz., that if the defendants, Fawns and Traill, attempted by virtue of the invalid lease to interfere with any of the rights of the plaintiffs, the latter had their remedy at law, and therefore could not invoke the aid of this court in its equity jurisdiction. For the plaintiffs the case of *Wheelwright v. Walker*, 23 Ch. D. 753, was relied upon, but that is a case since the Judicature Acts passed in England, which fuse law and equity, and so this objection could no longer be raised there; and, moreover, those Acts also confer upon the Courts their power to grant injunctions in cases in which this Court has at present no jurisdiction to do so. *Brooking v. Maudsley*, 38 Ch. D. 644. Exceptions have been engrafted upon the general rule already stated, and *Story*, p. 700, says as to void instruments :—"If an instrument ought not to be used or enforced it is against conscience for the party holding it to retain it, since he can only retain it for some sinister purpose. If it is a deed purporting to convey lands or other hereditaments, its existence in an uncancelled state necessarily has a tendency to throw a cloud over the title." In such cases the court will order the cancellation of the instrument, unless its illegality appears so clearly on the face of it that its nullity can admit of no doubt. For in that case "there can be no danger that the lapse of time may deprive the party of his full means of defence; nor can it, in a just sense, be said that such a paper can throw a cloud over his right or title." In the present case the invalidity of the lease as against the plaintiffs does not appear clearly upon its face, and it may throw a cloud upon the plaintiff's title. As against the respective interests of the plaintiffs the lease is admitted to be void, but it might be enforced against the life tenant to the extent of her interest, she, however, and the lessees consent to its being cancelled. The Court therefore decrees the lease to be delivered up and cancelled. With reference to costs, the necessity for any litigation at all unless and until Fawns and Traill attempted to act upon the lease, the invalidity of which had been pointed out to them, is open to question, and at most such a lease is but a very transient cloud upon the title. The bill, however, was filed on December 20, 1888, and on January 5, 1889, the defendants, Fawns and Traill offered to surrender the lease with the consent of all parties, and to pay the plaintiffs' costs to that date as between party and party, if the plaintiffs would stay proceedings, but the plaintiffs refused to do so, unless they were paid costs as between solicitor and client. The Court is of opinion that the defendants offered all that the plaintiffs were entitled to, and all that they could obtain if the suit went on to hearing, and was decided in their favour, and this being so, that the suit was thenceforth carried on unnecessarily and oppressively. The defendants must pay the costs of suit incurred up to the 5th January, and the plaintiffs must pay the defendants their costs subsequently incurred.

IN CHAMBERS.

(Before Kerferd J.)

WILLS v. CASTELLANO.

20th Dec.

Common Law Procedure Statute 1865 (*No.* 274) *sec.*

335—*Rules of Supreme Court* 1884 *Order LII r* 2 *Application to discharge a defendant from custody who has been arrested on a writ of capias should be by rule or order nisi and not by summons.*

Summons to discharge the defendant from gaol who had been arrested under a writ of *capias*.

Dr. Madden in support.

Mr. Isaacs to oppose. There is a preliminary objection. This application should be made by rule or order *nisi* and not by summons. This is expressly provided for by sec. 335 of The Common Law Procedure Statute 1865. He was here stopped.

Dr. Madden: By Order L11 r. 2. applications for a rule or order *nisi* are expressly abolished. Sec. 335 stands good except as to the procedure to be adopted in obtaining the discharge of a defendant. The procedure since the Judicature Act should clearly be by summons.

His Honor. I think that construction is erroneous. There is an express statutory provision that the application should be by rule or order *nisi* and that has never been repealed. I dismiss the summons with L3 3s. 0d. costs. Certify for counsel.

Solicitors for plaintiff, *Smart*; for defendant, *Woolf* and *Destrée*.

(Before Hood, J.)

Chamberlain v. McWhinnie.

6th Feb.

Imprisonment for Debt Act 1865 (*No.* 284) *s.s.* 2, 3—*Where a judgment debtor is brought up on a summons, upon which no order is made the jurisdiction to make an order against him is exhausted.*

Debtors summons.

It appeared that an order was obtained by the plaintiff against the defendant and removed into the Supreme Court in which judgment execution was issued and returned *nulla bona*. A debtors summons was then taken out by the plaintiff returnable in the month of August last on the return of which the debtor was charged with having had since the judgment sufficient means and ability to pay the debt and having refused or neglected to pay the same. Mr. Justice Williams before whom the summons was heard, after hearing the evidence of the defendant, refused to make an order. This summons was subsequently taken out, on the return of which the defendant was charged with the same offence.

Mr. Eagleson for the judgment creditor.

His Honor. Is not the jurisdiction of the Court exhausted by the decision of Mr. Justice Williams?

Mr. Eagleson. No. Mr. Justice Williams refused to make any order. But if he had done so that would not prevent the judgment creditor from taking out a subsequent summons and showing that the defendant had, since the hearing of the first summons, been guilty of fraud by having had sufficient means to pay and not having done so. Barry J., in *McKean v. Kavanagh* 2 A.J.R., at pg. 96 says that "The imprisonment is not a satisfaction of the claim, but a person may be imprisoned over and over again for repeated acts of fraud, not for a repeated failure of payment by instalments."

His Honor. In *Reg. v. Cope, exparte Fraser* 2 V.L.R. (L) at pg. 263, Stawell, C J. says "I think it questionable whether there could be several commitments for default of payment of the several instalments where the amount of a judgment has been made payable by instalments. But the debtor having been arrested for the whole debt, I have no doubt that the power of commitment was exhausted. There was a want of jurisdiction to issue a second summons with a view to a second commitment." If that be so I think that the order made by Williams J. in refusing to make an order exhausts the jurisdiction and that therefore I cannot entertain the application.

Solicitor for judgment creditor *A. D. J. Daly.*

(Before Hodges J.)

Glass v. The Trustees Executors and Agency Co. Limited, and Others.

Dec. 6th 9th

Settlement—Power of appointment—Exercisable by deed—By an indenture of marriage settlement a certain sum was transferred to trustees to be (and which subsequently was) invested in the purchase of real estate; the trusts were for wife for life, after her death, in the event of her predeceasing the husband, for the husband for life; "after the decease of the sur-"vivor leaving any child or children of the said "marriage as the said [wife] may notwithstanding "her coverture appoint." The husband predeceased the wife.

Held that the power of appointment was exercisable by will or by deed, and was not limited to the children of the marriage.

Originating summons referred into court.

The summons was taken out for the purpose of having certain questions of construction arising in relation to an indenture of marriage settlement, stated below determined by the court. The plaintiff was Lucinda Glass; the defendants were, the Trustees &c. Co., who were the present trustees of the settlement, and the surviving sons and daughters of the plaintiff.

The facts were as follows:—

An indenture of marriage settlement dated the 24th February 1852 was made between one Hugh Glass of the 1st part, Lucinda Glass (then Nash) the plaintiff of the 2nd part, and trustees of the 3rd part, being a settlement executed in contemplation of the marriage of Hugh Glass and the plaintiff. By it Hugh Glass conveyed certain lands to the trustees upon trust out of the rents &c. to pay L300 per annum to the plaintiff or to such person . . . . as the said Lucinda Nash should direct or appoint during her life for her separate use without power of anticipation

and, in case the plaintiff should predecease the settlor, to pay the same to Hugh Glass during his life subject to certain restrictions. On the death of both the trustees were directed to raise L3000 by sale of part or the whole of the lands, to invest the same, and hold it "for the benefit of all or any of the "children or child of the said marriage as the said "Hugh Glass shall by his will or testament in "writing direct or appoint." In the event of Hugh Glass surviving his wife and no children being born of the marriage, the lands were to be discharged from the above-mentioned sums. There was a further sum of L615 7s. 8d. which the trustees were directed to invest in the purchase or on first mortgage of real estate and to hold during the lives of Hugh Glass and the plaintiff upon the same trusts as were declared respecting the annuity of L300 and "after the decease "of the survivor leaving any child or children of the "said marriage as the said Lucinda Nash may not- "withstanding her coverture appoint," and in the event of there being no children of the marriage "in trust for the said Lucinda Nash her heirs &c." Hugh Glass died on the 15th May 1871 predeceasing the plaintiff and leaving 10 children. The defendant Co. subsequently came by devolution and appointment trustees of the marriage settlement. The questions that the court was asked to determine, were in effect 1st whether the power of appointment to be exercised by the plaintiff in relation to the sum of L615 7s. 8d. was a power to be exercised by will only or by deed or will and (2nd) whether the power was general or limited to her children.

Higgins for the plaintiff:—The power can be exercised either by deed or by will; there is no reference to the death of the survivor as being the time when the power of appointment is to be exercised; when there is a power of appointment generally and there is no statement as to whether the appointment is to be exercised by deed or by will, it may be exercised in either way; the strongest case against the contention of the plaintiff is *Freeland v. Pearson* (L.R. 3 Eq. 658) but that case has been disapproved of in *Humble v. Bowman* 47 L.T. Ch. 62; *Re Jackson's Will* (13 C.D. 189) is in favor of the plaintiff's contention.

Topp for all the defendants (except one); the words "after the decease of the survivor . . . leaving any child &c.," expressly show that the power is only to be exercised by will; they do not similarly occur in any of the cases cited: *Re Jackson's Will* is certainly a strong case against this contention, the power, however, obviously cannot be exercised during life time because the children can only be ascertained at death. [He referred to *Kennedy v. Kingston* (2 Jac. & W. 431); *Reid v. Reid* (25 Beav. 469); *Freeland v. Pearson* (L.R. 3 Eq. 658). *Doc. d. Thorley v. Thorley* (10 East 437).

Neighbour for one defendant cited *Archibald v. Wright* (9 Sim. 161).

Higgins, in reply, referred to Farwell on Powers (last ed.) at page 91.

His Honor:—

The first question I have to answer is whether the plaintiff has a power of appointment by will only or by will or deed over the property which at present represents the sum of £615 7 8. The clause of the settlement provides that the trustees shall "after the decease of the survivor" hold the same upon such trusts "as the said Lucinda Nash may notwithstanding her coverture appoint" *Prima facie*, the words "as Lucinda Nash notwithstanding coverture may appoint" are broad enough to cover an appointment by deed or by will, and they must be construed as giving such a power unless there is something else in the document which shows that such was not the intention. In arriving at what persons mean by certain words it is important to find out how the same persons use those words when treating of similar subjects. The parties in another part of the document have used the same words in relation to a similar subject where they have given a power to Lucinda Glass to direct or appoint. This latter power can undoubtedly be exercised by deed; and, accordingly, as far as an argument may be based on the words used, Lucinda Glass has the power to appoint by deed in the clause at present under discussion also. Then the question arises—do the parties mean the same thing, when they use the same words? Certainly *primâ facie*, one would say, Yes—And it is noticeable that a power to appoint by will or testament in writing is given to Hugh Glass, in that case the donee being restricted in the exercise of the power by means of a particular direction so that we have on the one hand the words not restricted where they mean that the power is to be exercised by deed or by will and again we have the words restricted when the power is to be exercised by will only. Accordingly I think that the words as occurring in the clause in question must be construed as unlimited. It is contended that the power should not be exercised by deed because of the expression "after the decease "of the survivor . . . leaving any child &c.," and it is said that these words show an intention that the power should be exercised by will only but the question is whether that does not rather intimate the time when the power is to be effectual than the time when the power is to be exercised. The M.R. in *Jackson's* case puts an illustration which seems to be apposite and the inference he derives from his illustration is that these words do not limit the power to an exercise by will only. He supposes the life estate to be in one person and the donee of the power to be another and distinct person. He, then, points out clearly that it would be idle to argue that the donor of the power could only exercise the power by will because the donee of the power might survive the tenant for life, and it makes no difference if the donee of the power and the tenant for life happen to be the same person. I therefore think looking at the language used in this particular document that the parties intended this power to be exercised by will or by deed. There is a second question, that is, whether the donee of the power can only exercise it in favour of the children of the marriage. I think the parties very likely meant that it should be confined to the children but I can find no expression in the document which points to

such a restriction, it is practically to such persons as she may appoint. The mere circumstance that she can only exercise it, if children survive her does not show that it should be exercised in favour of these children. I answer the question in the following manner:—Lucinda Glass has a power of appointment by deed or by will, contingently on her leaving children that power of appointment is general, and not limited to the children of the marriage. Costs of all parties to be taxed, and paid by the plaintiff, and to be charged on the lands at present representing the sum of L615 7s. 8d. costs of trustees as between solicitor and client.

Solicitors for plaintiff, *Crisp, Lewis & Hedderwick*; for defendants *Smart & Talbot.*

PROBATE JURISDICTION.

Before Hodges J.

In the Will of Alexander McDonald.

Dec. 19.

Practice Probate—Will—Grant of, probate of portion of the will.

A testator made his will on two sheets of brief paper fastened at the corner. A third sheet was annexed to them by way of a back sheet. At his death it was discovered that the second sheet had been torn out, and had disappeared. Both the first and second sheet had been duly signed and attested, the whole estate was disposed of by the first sheet, the second merely containing the ordinary trusts &c. Probate was granted of the first page only; the probate copy to bear date as of the original execution of the will as shown by the affidavit of one of the attesting witnesses.

Motion for grant of probate of portion of the will of Alexander McDonald deceased. The testator died on the 28th November 1889: prior to his death he had executed a will drawn up in the following manner: It was written on two distinct sheets of brief paper and signed and attested at the end of each page; these two sheets of brief paper (together with a third used by way of a back sheet) was fastened at the corner in the ordinary way by a fastener. The back sheet was endorsed as follows:—"Dated 6th March Will of Alexander McDonald. Watson and Pearson Ballarat." On the first sheet the testator had in various ways completely disposed of his estate, the second sheet being merely taken up with declaring the ordinary trusts. At the testator's death it was discovered that the testator had mutilated his will by tearing out the second sheet which had disappeared leaving simply the corner held by the fastener. It appeared from an affidavit of an attesting witness, that the will had been executed on the 6th March, 1885. Application was now made to the Court for a grant of probate of the first page only.

Hayes appeared in support:—The first page *per se* carries out the instructions of the testator; the second page is taken up merely with declaring the usual trusts; probate should be granted to the first page; the probate copy should be dated as of the 6th March 1885.

His Honor (after inspecting the documents) granted probate of the first page; the probate copy of the will to be dated as of the date of the original execution as shown by the affidavit of the attesting witness.

Proctors: *Watson* for *Pearson & Mann*, Ballarat.

IN THE COURT OF INSOLVENCY.

(Before Molesworth, Judge.).

Re Hoelter. Bleckman & Wessel.

5898

Insolvency Statute, 1871, *s.s.* 6—35—*Dissolved firm—Power of greater number of members of firm to petition for sequestration—Jurisdiction of Court to amend proceedings.*

Nov. 4, 22, 1889.

This was a motion to set aside the sequestration of a firm consisting of Hoelter, Bleckman & Wessel, who had carried on business in partnership under the names of "A Wessel & Co." and "The Victoria Tea Co." On the 7th August, 1889, two of the members of the firm, as being the greater number of members, had, under the 35th section of the *Insolvency Statute*, 1871, petitioned for sequestration of the partnership estate and disclosing the fact (as was subsequently found by the Court) that on the 13th April, 1889, the partnership had been dissolved and that the firm no longer existed as a going concern. The petition had been presented without the knowledge or authority of Wessel, who now moved to set aside the sequestration or to amend the proceedings by striking out his name. Messrs. Danby & Flack, had been appointed trustees of the estate. Wessel had himself on the 20th August, 1889, petitioned for sequestration of his estate and it had been sequestrated accordingly and a trustee, Mr. C. P. Williams, had been appointed in due course.

Mr. Issacs appeared for A. Wessel, and *Mr. Braham* for Hoelter & Bleckman and also for the trustees Danby & Flack.

For the motion it was argued that the 35th section did not apply to the case of a dissolved partnership that therefore Hoelter & Bleckman could not effectually petition for sequestration of the joint estate of the three but at most of their own joint estate. As to the jurisdiction to set aside or amend the 6th section of the *Insolvency Statute*, was relied on as well as the general jurisdiction of the Court to correct errors in its own proceedings. *Re Henry* 9 A.L.T. 57. For the respondents *ex parte Geisel—re Stanger* 22 C.D. 436, was referred to and it was

contended that the evidence showed the alleged dissolution was only one in name and not in fact.

His Honor allowed the motion so far as it asked for amendment by striking out Wessel's name and said :—This is a motion in the matter of Charles Hoelter, William Bleckman, and Allrecht Wessel, of which notice has been given in these words :—(His Honor read the notice). To that notice of motion objections have been filed. As I understand *Mr. Isaacs*, appearing for Wessel, puts this case that under the 6th section of the *Insolvency Statute*, and under the inherent jurisdiction of the Court the Court has power to set aside this order of 10th August /89, and all subsequent proceedings, or to amend by striking out the name of A. Wessel. *Mr. Braham* appears on behalf of the trustees elected under the order of the 10th August, /89, and also for Hoelter & Bleckman two of the three persons declared insolvent by the order of August 10th, /89, I have a number of affidavits before me. Looking at all these affidavits the facts, as they appear, to my mind, may be stated very shortly. Purporting to act under the 35th section of the *Insolvency Statute*, which provides as far as is material to this application that the estate of the firm may be made insolvent by the greater number of the members of the firm in Victoria, two members of this alleged firm, namely, Hoelter & Bleckman professed to act as if under this section and obtain an order dated 10th August, /89, sequestrating the estate of this firm and which under this clause of the Act would operate as sequestrating the estate of each of the partners. This application is practically to set aside this order on the ground that Wessel was not a member of the firm at the time and if that is so the other two persons were not the greater number of the partners of such firm at the time of the petition. Several points were raised but I am disposed to deal with this as a question of fact whether he was a partner or not on the 10th August, there is a considerable conflict of evidence. Hoelter & Bleckman are forced to take up the position that their affidavit in opposition to this motion is true but that a statement made by them previously is untrue—that statement being a letter copied in the affidavit of Wessel of October, 5th 1889, it is signed by themselves dated 13th April, 1889, and addressed to the manager of the New Oriental Bank Corporation, "We the undersigned partners hitherto trading as A. Wessel & Co., hereby give you notice that our partnership has this day been dissolved." Mr. Braham on behalf of his clients is forced to take up the position that if what his clients swear in their affidavit is untrue their statement in the letter is untrue. From these and numerous other facts in the case I come to the conclusion that on the 10th August, 1889. Wessel had ceased to be a member of the firm and consequently the order was bad, I am therefore prepared to make the order as asked in the alternative that the order of sequestration and all subsequent proceedings may be amended by striking out the name, Wessel and his trustee should undertake to bring no action against the trustee under the order of 10th August 1889 for all acts properly done if that order were a good and valid order. Wessel is not entitled to costs I say nothing at all about costs.

Solicitors, for Wessell, *Crisp, Lewis, & Hedderwick*; for Trustees, *Braham & Pirani.*

IN CHAMBERS.

(Before Hood, J.)

Richards v. Cadman.

11th Feb.

Instruments and Securities Statute 1864 (*No.* 204) *Sec. 22—Application for an order for deposit of the document proceeded upon should not be made ex parte.*

Application on behalf of the defendant for leave to appear to and defend an action brought against him on a promissory note.

The application was granted.

Mr. Box for the defendant then asked that the promissory note sought to be proceeded upon should be ordered to be forthwith deposited with an officer of the Court under Sec. 22 of *The Instruments and Securities Statute* 1864.

His Honor :—I do not think that I should grant an application of that nature *ex parte*. Both parties should be before me. I therefore refuse that part of the application.

Solicitors for defendant, *Pentland Roberts and Thompson.*

Wall v. Bank of Victoria.

11th 12th Feb.

Rules of Supreme Court 1884 *Order XIX r 27, Order XXV r. 4—Cases in which the power vested in the Judge under Order XXV r.* 4 *will be exercised—Pleading evidence.*

Application on behalf of the defendant calling upon the plaintiff to show cause why the statement of claim should not be struck out on the grounds that it discloses no reasonable cause of action and that it is frivolous and vexatious or in the alternative why paragraph 6 of the statement of claim should not be struck out on the ground that the same tends to prejudice embarass or delay the fair trial of the action :—

The statement of claim was as follows :—

1. In the year 1887 in an action in the Supreme Court No. 3971 the defendant herein recovered judgment for the sum of £583 6s. 2d. the amount due by the plaintiff to the defendant for principal interest and costs on a promissory note of the plaintiff to the defendant.
2. The defendant issued a writ of *fieri facias* on the said judgment against the plaintiff by which writ the sheriff of the Western bailiwick was directed to levy the sum of £621 14s. 3d.
3. Before the said sheriff proceeded to execute the said writ the plaintiff with the knowledge of the defendant tendered to the said sheriff the said sum of £621 14s. 3d. but the said sheriff, by the direction of the defendant refused

to accept the same, and by the defendant's direction sold under the said writ the following lands of the plaintiff [describing them].

4. The defendant purchased the said several pieces of land and proceeded to obtain and did in fact obtain possession of the same and has held possession thereof from the time of the said purchases by it and has obtained certificates of titles or Crown grants thereof from the Registrar of Titles.
5. The lands so purchased greatly exceed in value the said last mentioned amount and the defendant has received or might without wilful default have received large profits therefrom.
6. The plaintiff has offered to pay the defendant the said sum of £621 14s. 3d. and interest and has requested the defendant to transfer the said lands to him, but the defendant has refused to do so, but has offered to transfer the same to the plaintiff on payment of £1,106 —which sum greatly exceeds the amounts due to defendant on the foot of the said judgment.

The plaintiff seeks to have it declared that the defendant is a trustee for the plaintiff in respect of the said lands subject to the payment of the amount due by the plaintiff on the foot of the said judgment for principal interest and costs, and which amount the plaintiff is ready and willing and hereby offers to pay subject to such deductions as the court may declare the plaintiff entitled to.

That an account may be taken of what is due to the defendant on the foot of the said judgment and of the profits which the defendant has received or might without wilful default have received out of the said lands since taking possession of the same; and that the defendant may be ordered, on payment of the amount which will be found due on taking such account, to transfer the said lands to the plaintiff.

That the defendant may in the meantime be restrained by injunction from transferring or otherwise dealing with the said lands.

Mr. Moule in support. The claim does not disclose any cause of action. The defendant is a *bona fide* purchaser from the sheriff and his title is complete, and indefeasible. *Doe de Emmett v. Thorn*, 1 M. & S. 425; *Doe de Batten v. Murless*, 6 M. & S. 110. No fraud has been alleged to attack this title, and that is a necessary allegation to support the claim.

His Honor.—I think this an objection that might be taken in the defence.

Mr. Moule.—The court has often exercised its discretion under order XXV r. 4, and has ordered statements of claim to be struck out in applications of a similar nature to this. Counsel here referred to the cases collected in "The Annual Practice," 1889-90, at pg. 454. Paragraph 6 of the statement of claim is clearly wrong as it contains mere matters of evidence.

Mr. McDermott to oppose. The cause of action is on an equitable right. The bank has sold our property after tender; that is a wrong, and where there is a wrong there must be a remedy.

His Honor.—Do you admit that the bank has a good title to the land?

Mr. MacDermott—Yes, subject to our rights. The cause of action is this, you were offered our money and after that you have taken our land. The cases of *Castro v. Murray*, L.R., 10 Ex. 213., and *Dawkins v. Prince Edward of Saxe Weimar*, 1 Q.B.D. 499, were cited

His Honor said I will consider the matter.

His Honor on the following day read the following judgment. This is an application under order XXV. r. 4, on the part of the defendant to strike out the statement of claim on the ground that it discloses no reasonable cause of action and is frivolous and vexatious. Applications under this rule are intended to enable the parties to raise questions of law, and have them decided quickly (*Burstall v. Beyfus*, 26 Ch D. 35) and an action may be dismissed under this rule on the same grounds as those on which a demurrer might formerly have been allowed. But the action must appear on the face of it manifestly groundless (*Metropolitan Bank v. Pooley* 10 Ap. C. 210.) It must be so manifestly faulty that it does not admit of argument (*Bryer v. National Insurance Coy.* 8 A.L.T. 54) and if the pleading is intelligible in itself such objections should be taken in the reply (*Smith v. President &c. of St. Arnaud* 8 A.L.T., 53). And the question is not whether the pleading is good or bad, but whether it can be regarded as frivolous or vexatious, or unreasonable (*Dadswell v. Jacobs*, 34 Ch. D. 284) or as disclosing a case which the court is satisfied will not succeed *Republic of Peru v. Peruvian Guano Coy.* 38 Ch. D. 489). The statement of claim in the present case is peculiar. It substantially alleges an execution by the present defendant against the present plaintiff—tender of the amount due, and a subsequent sale with knowledge under which sale the present defendant, the then execution creditor, purchased the plaintiffs land, and obtained a certificate of title. The plaintiff then claims a declaration that the defendant is a trustee of the land and should be ordered to transfer, on payment of the amount of the judgment. No damages are claimed and there is no distinct allegation of fraud. For the defendant cases were cited to show that the purchaser from the sheriff obtains a good title and it was then argued that the defendant, having a certificate of title, cannot now be disturbed. But on the allegations in the claim the defendant became purchaser with knowledge and was the author of the wrong, which, if these allegations are correct, the plaintiff has undoubtedly suffered. The plaintiff may have great difficulty arising from the "Transfer of Land Statute," and also from the fact stated in argument that he omitted to defend on equitable grounds an action of ejectment which the bank brought against him (see *Hurst v. Bank of Australasia*, 2 V.R. [L] 217). But the statement of claim is perfectly intelligible. It certainly is not either frivolous or vexatious nor does it appear to me so manifestly faulty as not to admit argument. I therefore so far refuse this application. There is however another fault found with the statement of claim on the ground that a portion of one of the paragraphs is embarrasing, viz: that portion of paragraph 6 which alleges that the defendant offered to transfer the land to the plaintiff on payment of L1,106. This objection I think well founded. It was conceded in argument that the contested statement only tends to show that defendant admits its position as trustee for plaintiff. If so it is clearly pleading evidence and therefore bad. And if the previous allegations in the statement of claim are correct this paragraph is superfluous and if those

allegations are false they are not cured by any admission of defendants. Besides the defendant would be entitled to deny this paragraph and thus the record would be embarrassed by having an immaterial issue for trial. I think therefore the summons should be allowed on this ground but as the defendant has failed on the other and more important point I give no costs. Certify as between solicitor and client.

Solicitors for plaintiff, *MacDermott*; for defendant, *Moule & Seddon.*

COBURN v. BROTCHIE AND ORS.

13th Feb.

Rules of Supreme Court 1884, *Order XIII r. 2—Where a plaintiff desires to proceed under Order XIII r. 2, he must serve the writ of summons and file an affidavit of the service before signing judgment, even though the defendants' solicitor has undertaken to accept service.*

Application on behalf of the defendants that the judgment herein entered by the plaintiff against the defendants and all subsequent proceedings thereon be set aside.

It appeared from the affidavits that service of the writ of summons, which was indorsed for work, journeys, attendances, etc., by the plaintiff as solicitor for the defendants, was accepted by the defendants solicitor on the 29th January 1890. No intimation of the plaintiff's intention to sign judgment was given to the defendants' solicitor nor was any request made by the plaintiff or his solicitor to the defendant's solicitor to enter an appearance. On the 7th February 1890 at 10.50 a.m., the plaintiff filed the original writ of summons with the acceptance of service endorsed upon it and judgment was thereupon entered. At 2.30 p.m. on the same day an appearance was entered to the writ on behalf of the defendants and the appearance and notice of appearance were served on the plaintiff's solicitor. The application was now made to set aside the judgment on the ground that the judgment in default of appearance had been entered without filing an affidavit of service as provided by Order XIII r. 2.

Mr. Isaacs in support. Order IX. r. 1 provides that service of the writ is not required where the defendant by his solicitor undertakes in writing to accept service and enters an appearance. In this case no appearance had been entered by the defendants' solicitor prior to the judgment so that that rule does not apply. Order XIII r. 2 provides that where the plaintiff desires to proceed upon default of appearance he shall, before taking such proceeding upon default, file an affidavit of service; this rule is imperative and as no affidavit of service was filed before the judgment was entered the judgment is bad. The plaintiff had two courses open to him, he might have served the defendants or he might have applied to attach the defendant's solicitor for not entering an appearance in pursuance of his written undertaking under Order XII r. 18.

Mr. Duffy to oppose contended that where service was accepted by the defendants' solicitor there was no need to file an affidavit of service before proceeding in default of appearance.

HIS HONOR. I think the interpretation placed upon the rule by Mr. Isaacs is the correct one. I shall therefore allow the application. It seems to me that both parties have been to blame in this matter, the defendants for not having entered an appearance within the proper time, and the plaintiff for not having communicated with the defendants' solicitor before he entered judgment. I certainly think that where one solicitor has accepted service of a writ another solicitor should not sign judgment for default of appearance without having first given an intimation of his intention to do so. I therefore allow the summons without costs. I certify for counsel.

Solicitors, for plaintiff *Gresson*; for defendants, *Eggleston, Derham* and *Martin.*

Before Hood J.

McGEE v. BEATTIE.

19th 21st. Feby.

Rules of Supreme Court 1884 *Order III r. 6—Order XIV r. 1—Special indorsement—Where a writ was endorsed with a claim against the defendant in her personal capacity and also against her in her representative capacity final judgment was ordered under Order XIV r. 1—The character in which the defendant is sued need not be stated in the title of the writ, it is sufficient if stated in the indorsement.*

Application on behalf of the plaintiff for leave to sign final judgment under Order XIV. r.1.

The title of the action was *McGee v. Mary Beattie.*

The indorsement on the writ was in the following form.

The plaintiff's claim is against the defendant as administratrix of R. C. Beattie deceased for moneys due by him under a covenant in a bill of sale dated the 13th June, 1887 made between the said R. C. Beattie of the one part and the plaintiff of the other part, and filed in the office of the Registrar-General and duly renewed.

Particulars here followed.

And also against the said Mary Beattie in her personal capacity for the price of goods sold and delivered in her personal capacity for the price of goods sold and delivered and for rent.

1888	Particulars
16th December to 1889 30th November	Moneys due for goods supplied precise particulars whereof have been rendered.

Mr Isaacs in support moved for judgment.

Mr. Bryant to oppose. The writ is endorsed with a claim against the defendant in her personal capacity and also in her representative capacity. In *Short v. Taylor*, A.L.T. 10, a claim for an unliquidated demand was joined with a claim for a liquidated demand and the writ of summons was held not to be a specially indorsed one. By Order XVIII. r. 5 it is provided

that claims against an administrator may be joined with claims against him personally, provided the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff sues. This rule does not apply, for the claim against the defendant personally is for the price of goods sold and delivered and for rent, which have nothing to do with the estate which she is administrating. With regard to the claim against the defendant personally that is not specially indorsed because it does not give particulars of the claim. *Perry v. Flint*, 9, A.L.T. 99; *Windsor Coffee Palace v. Cheel*, 10 A.L.T. 275. The defendant ought to be furnished with such particulars as will enable her to see whether she owes the money or not.

His Honor.—In *Smith v Wilson*, 4 C.P.D. 392, particulars very similar to the present were held to be sufficient.

Mr. Bryant.—The writ itself is bad, because the title is simply as against Mary Beattie, and should be against her in her representative capacity.

Mr. Isaacs.—In *Pickers v Speight* 22 Q.B.D. 7, it was held that the Indorsement is a special one if it gives sufficiently specific particulars to bring to the mind of the defendant knowledge as to what the plaintiff's claim is. The defendant has not filed any affidavit and therefore she must be taken to know all about the claim. The character in which the defendant is sued need not be stated in the title, it need only be stated in the indorsement. This has been done in the present case. Chitty's Forms, 12th Ed page 61.

His Honor.—I am inclined to grant the application because I think that applications under Order XIV r. 1. should be granted unless the defendant shows that there is a defence. In this case no affidavit has been filed, the defendant contenting herself with relying on a number of technical objections to the form of the writ. If however the defendant does not know the particulars of the amount for which she is sued in her individual capacity I will grant an adjournment for 2 days to enable her to file an affidavit to that effect.

Mr. Bryant said he would ask for the adjournment, which was granted. On the application being again mentioned Mr. Isaacs informed the judge that no affidavit had been filed by the defendant.

His Honor,—I order final judgment for the amount claimed on the writ with £12 costs of the action and £2 for the costs of the adjourned application to be paid by the defendant to the plaintiff. I certify for counsel.

Solicitors, for plaintiff, *O'Hea;* for defendant, *Gaunson and Wallace.*

Beecham v. Pater; Mrs. Taylor [Garnishee] Eggleston, Derham & Martin; and Cartwright [Claimants.]

——— 21st, 24th February

Judicature Act 1883 (*No.* 761) *sec.* 3—*Rules of Supreme Court* 1884 *Order XLV r.* 9—*Garnishee order nisi—Garnishee's costs—Equitable assignment—A garnishee is a party to garnishee proceedings and therefore a Judge has power to provide for his costs under Order XLV r.* 9—*No particular form of words is necessary to constitute an equitable assignment provided that it appears that there is an intention of transferring or appropriating the chose-in-action to or for the use of the assignee.*

Garnishee order *nisi*.

Mr. Box for the garnishee took no part in the argument but simply asked that his costs should be provided for.

His Honor said:—I have had some doubt as to whether I could give a garnishee costs. Order XLV r. 9 provides that "the costs of any application for an attachment of debts and of any proceedings arising from or incidental to such application shall be in the discretion of the Court or a judge" and I doubted whether a garnishee was a party to the application, I find however that by sec. 3 of the Judicature Act the word "party" includes every person served with notice of or attending any proceeding although not named on the record. I therefore think that a garnishee is a party within the provisions of that rule and that I can provide for his costs.

Mr. Isaacs for the claimants Eggleston Derham & Martin.—The defendant Pater commenced an action against the garnishee on the 28th May 1889. The claimants for whom I appear acted as solicitors for the defendant and the defendants incurred a liabilty to them of L89 2s. 4d. for costs in that action which was settled by arbitration. We claim a solicitor's lien over the sum owed by Mrs. Taylor to the defendant as the fruit of the award in the action. The lien of the solicitor of a plaintiff for the costs of an action attaches to money received by the plaintiff by way of compromise where such money is in substance the fruit of the action. *Ross v. Buxton*, 42 Ch. D. 190. A creditor can only attach by a garnishee order such property of his debtor as the debtor could deal with properly and without violation of the rights of other persons. Therefore an equitable charge, obtained before a garnishee order takes priority of the order, even where no notice of the charge was given. *Badeley v Consolidated Bank* 38 Ch. D. 238. Our lien commenced on the 28th May 1889. The assignment under which the claimant Cartwright claims is dated the 21st August 1889 and the garnishee order *nisi* is dated 22nd November 1889 therefore our charge arose first.

Mr. Wasley for claimant Cartwright.—This claimant rests his claim upon two letters of the 21st August 1889, one addressed by the defendant to Mr. Flannagan the architect for certain houses the garnishee was building in the following terms.

"As suggested by you I am willing (on your handing me your final certificate for the Andrew Street Building) that Mrs Taylor retain £50 out of the money to be awarded to me by the arbitration or of any other money coming from her to me as security for the payment of the amount which may be hereafter found to be justly due by me to Mr Cartwright for plastering and for which you became security on my account."

The other letter is from Flannagan to Cartwright and is in the following terms.

I am requested by Mr Pater to inform you that he has this day handed to me a letter requesting Mrs Taylor to retain the sum of £50 to cover any claim of yours for work done at her premises in High St. and Andrew St. Prahran.

This is a valid assignment. there is a specific fund stated out of which the money is to be paid and the addition of the words "or out of any other money coming from her to me" does not make the assignment valueless. I acknowledge the priority of Eggleston, Derham and Martin's claim.

Mr. Mitchell.—It does not appear that the offer by the debtor contained in the first letter was ever communicated to the garnishee and therefore until that is done the assignment is invalid. There is another objection; a mere order by a creditor to his debtor to pay a sum of money to a third person is not an equitable assignment unless it specifies the fund or debts out of which the payment is to be made. Here the fund is not specified for the sum is to come out of the money to be awarded or out of any other money coming from Mrs Taylor to the judgment debtor; that cannot be said to specify the fund out of which payment is to be made. He cited Tudors Leading Cases in Equity 2 vol. pp. 843, 844.

His Honor ssid :—I will consider the matter.

His Honor on a subsequent day read the following judgment :—This is a garnishee order. The garnishee appeared and did not dispute the debt, but suggested that others were interested. Those others have appeared and all parties have consented that I should dispose of the matter. One claim was made by Messrs Eggleston Derham and Martin on a solicitors lien and another by Mr. Cartwright who set up an equitable assignment prior in date to the garnishee order *nisi* by virtue of the following letters. [His Honor read the letters.] During the argument it was conceded that Messrs. Eggleston Derham and Martin were entitled to be paid first and the dispute was narrowed down to whether there was or was not any equitable assignment. No evidence was given, but I gather from the documents that during last year the defendant Pater was building some houses for the garnishee Mrs Taylor, the architect was Mr. Flannagan; Pater was in debt to some unsettled amount to Mr. Cartwright and Mr. Flannagan had become security for that debt; then on the 21st August, 1889, the defendant Pater wrote the letter to Mr. Flannagan and Mr. Flannagan on the same date wrote to Mr. Cartwright and it is admitted that notice of these letters was given to Mrs. Taylor before the garnishee order *nisi* and the request therein made assented to by her and I assume that the second letter was written at the request of Pater as stated therein. It was objected on behalf of the execution creditor that there was no assignment to Cartwright for two reasons (1) that there was no fund specified and (2) that there was no Order on Mrs. Taylor to pay and in support of this objection a passage from the judgment of Lord Truro C., in *Rodrick v. Gandell* 1 De G. Mac and G. 763 quoted in 2 W. and T. L. C. 6 Ed at pg. 844 was relied upon. It was there laid down "that to constitute a valid equitable assignment there must be an agreement that the debt shall be paid out of a specific fund coming to the debtor or an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the Order directing such person to pay such funds to the creditor." As to the first of these grounds I think that the fund is sufficiently designated (*Brice v. Bannister* 3 Q.B.D. 569; *Buck v. Robson* ibid 686; *re Hall*, 10 Ch D. 615., *Webb v. Hall* 30 Ch D 192. As to the other point I cannot read the words of the judgment quoted to mean as contended that the Order must be directed by the debtor to the creditor. No particular form of words is necessary to constitute an assignment provided that it appears that there is an intention of transferring or appropriating the *chose-in-action* to or for the use of the assignee. It is true that on the document Mrs. Taylor's name does not appear nor is there any direct order or request to her to pay the money. But there is a statement by Pater of his willingness that Mrs. Taylor should retain L50 as security for payment of the amount found to be due to Mr. Cartwright and this I understand to mean that he is willing that Mrs. Taylor should, to the extent of L50, pay Cartwright if she is willing to do so. This statement was communicated to both Cartwright and Mrs. Taylor and assented to by both prior to the garnishee summons. I think this does evince an intention by Pater that the money should be appropriated for Cartwright's use and that he and the execution creditor are both bound by it. It is probable that the document was meant more for the assurance of Mr. Flannagan than for any particular benefit of Mr Cartwright, but the motive does not alter its effect. The figures have been agreed upon and I therefore order that out of the money in her hands the garnishee be at liberty to retain L3 3s. 0d. for her own costs; that she pay Eggleston and Co., L85 for debt and L3 3s. 0d. for costs; that she pay Cartwright L50 for debt and L3 3s. 0d. for costs; and pay the balance to the execution creditor. Certify for counsel.

Solicitors, for judgment creditor, *McFarlane* and *Tolhurst*; for garnishee, *Hopkins*; for claimants, *Eggleston*, *Derham* and *Martin* and *Flood*.

CHAMBERLAIN v. McWHINNIE.

26th Feb.

Imprisonment for Debt Act 1865 (*No*, 284) *s.s.* 2, 3—*Debtor's summons — Variation of judgment.*

Debtor's summons.

His Honor said. I see by the report of this application (*ante* pg. 118) that I am taken to have held that under the circumstances of the case I had no jurisdiction to make the order sought What I meant to say was that the case of *Reg v. Cope exparte Fraser* 2 V.L.R. (L.) 261 threw such a doubt upon the question of jurisdiction that I would not make the order in the debtor's absence. I did not wish to decide the question as to whether there was jurisdiction to make the order. Under the circumstances I meant to refuse the application merely on the ground of the absence of the debtor.

PRACTICE COURT.

(Before Hood, J.)

RIDDELL v. MCWHINNIE.

——— 18th, 19th, 24th, Feb.

Rules of Supreme Court 1884, *Order XXVII r.* 11—*Motions for judgment under Order XXVII r.* 11, *and analogous motions can be listed for hearing on the days set apart for hearing probate applications so long as Mr. Justice Hood hears such applications.*

Motion on behalf of the plaintiff for liberty to sign final judgment L2,999 10s. the amount f nud by reference to the Chief Clerk to be due by the defendant to the plaintiff and the costs of the action and of this application.

The writ of summons was endorsed for an account. The defendant did not appear and the plaintiff took out a summons under Order XV r. 1 for an Order that the action be referred to the Chief Clerk with all the powers as to certifying and amending of a judge of the Supreme Court. The Order having been made the Chief Clerk certified that the sum of L2,999 10s. was due by the defendant to the plaintiff. The plaintiff moved upon that certificate for liberty to sign final judgment.

Mr. Anderson in support. There is some doubt as to whether this application should be made to this Court or whether the case should be listed and judgment moved for in the ordinary way. The cases of *Harris v. Rowley* 10 A.L.T. 270 and *Hooke v. Johnston* ibid 277, were cases under Order XXVII r. 11 which expressly provides that the plaintiff is to set down the action where the defendant has made default in delivering his defence, but in this case the defendant has not appeared and therefore that rule is not applicable. There is no actual authority as to the procedure to be adopted in this case but judging from the forms given in Daniell's Chancery Forms 4 Ed. ps. 56 and 662 and from Daniell's Chancery Practice 6 Ed. pg. 1548 it seems that the procedure now adopted is the correct one, and this is further borne out in the decision of *Smith v. Davies* 28 Ch. D. 650.

No appearance for the defendant.

HIS HONOR said. In this instance this procedure might be advisable but in a contested matter it would be most inconvenient. I will consider the matter.

HIS HONOR on the following day said. I have consulted Hodges, J., who informs me that he has followed the practice laid down in *Harris v. Rowley* and *Hooke v. Johnston*. I therefore make no order. I think it would be an excellent plan to appeal to the Full Court to have the matter settled for the practice is in a most unsatisfactory state at present.

HIS HONOR on a subsequent day said. I have seen the Prothonotary with regard to motions for judgment in a case like the present and under Order XXVII r. 11 which is very analogous and I have instructed him to set down such motions in a list which I will adjudicate upon on Thursdays. I have not consulted any of my brother judges but that will be my practice so long as I take the Probate business.

Solicitors, for the plaintiff *Kidston* and *Son*.

SUPREME COURT SITTINGS.

(Before Webb, J.,)

LANGIER v. THE VICTORIAN SCHANSCHIEFF ELECTRIC LIGHT AND POWER COMPANY, LIMITED, & OTHERS.

——— Feb. 3, 4.

Limited Company—Amount of capital subscribed for —Power to commence business.

A company was formed, the capital being L100,000 *in* 100,000 *shares of* L1 *each*; 65,000 *shares were offered to the public; it was provided* (*inter alia*) *by the prospectus that* L45,000 *was to be appropriated out of this issue for working capital; it was also provided that* 10,000 *fully paid up shares and a bill at four months for* L20,000 *should be given by the company for the purchase of certain patent rights; the directors subsequently arranged, in lieu of this arrangement, to give* 30,000 *fully paid up shares for these rights; previous to the issue of the writ in the action,* 17,131 *shares were allotted, in addition to the aforesaid* 30,000. *An action was instituted by the plaintiff to restrain the defendants from commencing business on the ground of insufficient working capital. Held, that there was not such a disparity between the number of shares actually allotted and the proposed working capital as to induce the court to grant the injunction.*

Action by Charles Langier against The Victorian Schanschieff Electric Light and Power Company Limited, and Charles S. Paterson, George Cornwell, W. B. Tappin, and James S. Butters. The plaintiff claimed to have his name removed from the share register of the company and that the money paid by him should be repaid with interest; and that the company and the other defendants be restrained from carrying on the business upon the present working capital or from enforcing any calls for that purpose; or, L250 damages. The statement of claim alleged that in August 1888, one Alice Cornwell issued a prospectus of the Victorian &c. Company Limited, capital to be L100,000 in 100,000 shares of L1 each for the purpose of purchasing from the said Alice Cornwell certain patent rights in the Schanschieff Electric Light battery at the price of L30,000 payable by 10,000 fully paid up shares and a bill at four months from the Company for the balance, and 65,000 shares were then offered to the public; it was provided by the prospectus that L45,000 would be appropriated out of the present issue for working capital. It was further alleged that about the 25th August, 1888, Alice Cornwell in order to induce the plaintiff to take shares in the company fraudulently represented to him

that one A. C. F. Webb had taken shares therein; that the plaintiff relying on the prospectus and on the representation agreed to take 200 shares and paid in all up to the time of bringing the action L150; that only about 10,000 shares had been applied for when the company had been registered; that the defendants, Paterson, Cornwell, Tappin, and Butters, with full knowledge of the above stated facts agreed to give Alice Cornwell 30,000 fully paid up shares in lieu of the arrangement already mentioned; that the said defendants were carrying on the said company with a capital of less than L9,000. It was proved at the hearing that at the time of the incorporation and registration of the company 17,131 shares had been applied for which together with the 30,000 allotted to Alice Cornwell brought the total amount to 47,131 shares, and that the directors had full power under the Articles of Association to pay Alice Cornwell as aforesaid; that A. C. F. Webb, was, at the incorporation and registration of the company an applicant for 300 shares.

Topp (with him *Agg*) for the plaintiff. The statement that Webb was a shareholder was a fraudulent misrepresentation: from the statement in prospectus plaintiff concluded that the company would not be incorporated till 45,000 shares had been applied for; the statements in prospectus are binding on company because it is the cradle of the company: *Elder v. New Zealand Land Improvement Company Limited*, (30 L.T. N.S. 285) referred to.

Isaacs (with him *Cussen*) applied for a non suit; No case has been proved; Webb is a shareholder; according to recent decisions there must be actual fraud; therefore *Elder v. N. Z. Land Improvement Co. Ltd.* does not apply. He referred to Buckley (on Companies) 5 Ed. 105-6.

[Per Curiam. I will hear the case out.]

Isaacs summed up.

Agg, in reply referred to *Re Gambrinus Lager Beer Co.* (12 V.L.R. 446.)

His Honor:—This action is brought by a shareholder in the Victorian Schanschieff Electric Light Company Limited, in which he seeks to have his name removed from the share register, and to have the money paid by him for shares repaid to him. There is a claim for alternative relief of payment to the plaintiff of L250. But that is substantially the relief which the plaintiff seeks. The grounds on which he seeks it are that he alleges that he was induced to take these shares by fraudulent misrepresentations by Miss Alice Cornwell, and by a fraudulent misrepresentation contained in the prospectus of the company. As to the misrepresentation by Miss Cornwell, it is alleged that in order to induce the plaintiff to take shares in the company she falsely and fraudulently represented to the plaintiff that one A. C. F. Webb had taken shares therein. Plaintiff's evidence is that he saw Miss Cornwell, and said to her that he would like to know somebody who knew something about the matter who was taking an interest in the company, to which Miss Cornwell replied, "Mr. Webb, our electrician, is a large shareholder in the company." That is the evidence of the plaintiff as to the representation made to him. I find on the evidence that the representation is perfectly true. Mr. Webb signed an application for shares. He paid his deposit money, and so far as the evidence showed he had not repudiated the shares, and he continues to be a shareholder; therefore so far as that misrepresentation is concerned it fails altogether. I find on the evidence that if the representation was made it was perfectly true. The next representation on which the plaintiff relies, as stated in the statement of claim, is that "by the prospectus it was provided that L45,000, less brokerage and incidental expenses, would be appropriated out of the present issue for working capital, which it was considered would meet the requirements of the company's operations at the outset. The prospectus contains this statement:—

"The sum of L45,000, less the brokerage and the incidental expenses in connection with the floating of the company down to the allotment of shares, will be appropriated out of present issue for working capital, which, it is considered, will meet the requirements of the company's operations at the outset. The remaining 25,000 shares will be available should further capital be required.

I find nothing in the prospectus amounting to a representation that the company would not commence operations till the L45,000 had been subscribed. It has been attempted to back up this alleged misrepresentation by an argument that the directors commenced the operations of the company without sufficient capital being subscribed. But there is nothing to show that the company was to wait till the whole of the capital was subscribed before the company commenced operations, which was quite another matter. Another grievance alleged by the plaintiff is that the purchase was to be made from Miss Cornwell of her patent rights for L30,000, that that L30,000 was to be paid by L10,000 in paid-up shares, and that she was to receive a bill for the balance at four months. That was treated in the most airy manner by the plaintiff; and it was treated as if the bill for L20,000 at four months was all that was necessary to be given; that the L10,000 in paid-up shares having been given, and the bill for L20,000 having been given, the rest of the capital might be appropriated for working expenses of the company, utterly ignoring the fact that the bill had to be paid. And no long time had to elapse before the bill had to be met. It is alleged as a grievance of the plaintiff that instead of giving the bill, 20,000 shares were issued to Miss Cornwell; that she was paid by shares in lieu of giving her a bill. It was said that the company had no right to issue the shares. But she had a right, as any other member of the public, to apply for shares if she liked. I should have thought it would have been to the advantage of the company if the 20,000 shares were taken up instead of a bill being given, and the amount it represented repaid shortly afterwards by the company. I

see nothing fraudulent or improper in Miss Cornwell taking the 20,000 shares fully paid up and treating it as payment of the amount due to her in payment fer her patent rights. The shares issued to her were as much issued to the public as if they were issued to any one of the public. She had to be paid the bill to be given to her. The shares were not the less issued to the public because Miss Cornwell was the party who chose to take them. The number of shares that were issued was 47,131, and the specific misrepresentation relied upon in the prospectus is that the prospectus is supposed to have stated that L45,000 would be appropriated to the working capital. It does not state that it would be appropriated in that way. It states that the sum of L45,000, less the brokerage and the incidental expenses in connection with the floating of the company, down to the allotment of shares, will be appropriated out of present issue for working capital, which it is considered will meet the requirements of the company's operations at the outset. In other words, if they got the public to take it up, the money would be applied out of the first issue; if not, the money would be applied as the company took up the shares. One misrepresentation alleged was that the directors commenced business with insufficient capital, and therefore the plaintiff ought to be allowed to repudiate his shares. The authority relied upon for that was *Elder v. The New Zealand Improvement Company.* But that case did not come any way near the present. There the company issued a prospectus stating that the first issue of shares would be L250,000. The company issued 900 shares at L20 each out of the 250,000, making a capital of L18,000 instead of L250,000, and the directors commenced business on that capital. One of the shareholders brought an action, and said that the company had no right to commence business with capital of L18,000 when the prospectus said that it required a capital of L250,000. Vice-Chancellor Malins held that the plaintiff was right in his contention, and on that ground he overruled a demurrer to the bill. Taking the facts as admitted, the vice-chancellor held that the defendant company was not justified in commencing business with that capital, and he ordered the plaintiff's name to be removed from the register. But the proportion between L18,000 and L250,000 in that case is very different from that between L47,000 and L75,000 in the present case. Here more than 47,000 shares had been taken up out of 75,000. There is no ground for the suggestion that the whole of the 75,000 shares had to be subscribed before commencing operations. The plaintiff says that L30,000 was to be provided for Miss Cornwell, and that L45,000 was to go for the working of the company, and that would make up the whole of the L75,000. That contention is untenable. The plaintiff has failed on every point, and the judgment will be for the defendants, with costs.

Solicitors: For plaintiff, *Morgan and Gill;* for defendants, *Cuthbert, Hamilton and Wynne.*

(Before Holroyd, J.)

WERNER v. BOEHM AND OTHERS.

Feb. 10.

Transfer of Land Statute 1866, *No.* 301, *s.* 111, *Tranfer of Land* (*Dower* 1869), *Statute No.* 353, *s.* 12, *Statute of Trusts* 1864, *No.* 234 *s.* 19—*Vesting order—Notice.*

W. B. and H. were co-trustees for a certain religious body and as such were the registered proprietors of certain land. W. was removed from his office of trustee and S. appointed in his place; thereupon W. entered a caveat against dealings with the said land. B. H. and S. subsequently applied to W. to execute a transfer from W. B. and H. to B. H. and S. which W. refused to do. B. and H. then applied to the Commissioner of Titles for an order vesting the land in themselves (with the intention of afterwards transferring to themselves and S). The order was made, no notice being given to W. The order was forwarded for registration and then W. received notice of the intending dealing by reason of his caveat. He applied to the Court for an injunction.

Held, that even assuming that the Commissioner of Titles had jurisdiction to make the order, he should not have done so until notice had been given to the parties interested.

Action by Henry Werner against J. E. Boehm, E. Haustorfer, C. Schmidt, and H. C. A. Harrison, Registrar of Titles. The plaintiff claimed an injunction to restrain the last named defendant from registering a certain vesting order hereinafter described, and an order setting aside the said vesting order. The facts were as follows:—In 1874 a number of members of the Evangelical Lutheran Church who had settled around Natimuk formed themselves into a body for the purposes of their religion; the plaintiff and the two first named defendants were appointed trustees of any property acquired by the church so formed; a block of land was purchased and a certificate of title was duly issued to the three trustees; this certificate was dated the 17th Sept. 1875, and with a view to protect the interests of the congregation a declaration of trust dated 10th Jan, 1876 was executed by the trustees and a copy deposited in the "Titles Office." This deed contained (*inter alia*) the following clauses: (7).—"If at any time one or more of the trustees shall "wilfully transgress or break the rules of this deed of "trust . . . . . it shall be lawful for the . . . "congregation at a properly convened meeting to elect "another trustee in his place and after such election "has been witnessed by the signature of the chairman "or another member of the meeting the remaining "trustees shall have their names registered together "with the newly elected trustee as trustees at the "office of Titles according to the Real Property Act "for the time being and according to the rules which "may then be in force with regard to the within "mentioned land and it shall be compulsory to alter "the name or names of the new trustee or trustees in

"the duplicate copy of the deed deposited in the Office "of Titles." (13). "That meetings of the congrega- "tion can be held at all times and places when and "where thought proper but if it is intended for all "members present or absent to take into consideration "elections and resolutions there shall first notice be "given of the same in church the two preceding Sun- "days during Divine Service of the time place and "reason of such meeting . . . . " Owing to circumstances which it is unnecessary to detail, the majority of the congregation recently deemed it advisable to obtain the removal of the plaintiff as trustee. Notice of a meeting under clause 13 was accordingly given specifying as the time 3 o'clock on a certain Sunday (but the actual time at which this meeting was held was one o'clock on that day, and a resolution was passed removing the plaintiff and appointing one Carl Schmidt (the 3rd defendant) in his stead. On the 2nd Aug. 1889, an order vesting the above mentioned land in the defendants Boehm and Haustorfer was made by the Commissioner of Titles, no notice having been given to Werner of the intended application and no transfer having been executed by him, on the 9th Aug. this vesting order was transferred to the Registrar General for the purpose of being registered ; but as Werner had previously on the 10th April 1889 lodged a caveat, notice of the intended dealing was given to him he thereupon instituted the present action.

Goldsmith for the plaintiff. The Commissioner of Titles had no jurisdiction to make the order, if he had the plaintiff should have had notice of the intended application. Statute of Trusts secs. 19, 40, 43 ; sec. 111 Transfer of Land Statute ; sec. 12 (No. 353).

Higgins (with him *Irvine)* for the three first named defendants. No notice is necessary (he referred to latter part of sec. 111 "Transfer of Land Statute,") if necessary, these defendants were not bound to give it.

Neighbour, for the Registrar ; sec 137 Transfer of Land Statute releases this defendant from liability (he referred to *exp.* Bond (6 V.L.R. (L-) 458.)

His Honor ;—The two first-named defendants, Johann Ernest Boehm and Ernest Haustorfer, were trustees with the plaintiff, Henry Werner, of some land, which was held by them in trust for the benefit of the congregation or the Evangelical Lutheran Church, at Natimuk. For some reason not disclosed the members of the congregation became dissatisfied with the conduct of their minister, and they desired that the minister should be requested to leave the church. They desired that the three trustees should enforce that resolution. and two of the trustees, Boehm and Haustorfer, were willing to do so. The third trustee, the plaintiff, was not willing. On the 7th April, 1889, a meeting of the congregation was held in the church, at which metting a resolution was passed removing the plaintiff from his office of trustee. Another resolution was passed electing the defendant, Carl Schmidt, to be a trustee in his place. That resolution was in effect carrying out the will of the congregation. The plaintiff, in effect, said that he refused to resign as he did not think he was obliged to do so under the deed of trust which he executed in common with the other trustees. It appeared that the deed was dated January 10, 1876, and that it declared not only the trusts under which the land was held, but contained the constitution of the church and the regulations by which the congregation were to be governed. On the 10th April, 1889, three days after the resolution depriving the plaintiff of his office of trustee, the plaintiff lodged with the registrar of titles a caveat affecting the land of which he was trustee in common with the two first-named defendants. On the 22nd June following the two first-named defendants made an application that an order vesting this piece of land in them should be made by the commissioner of titles No notice of this application was given to the plaintiff, and he had no opportunity of being heard in opposition to it. An application for a vesting order was made to the commissioner of titles, pursuant to section 12 of the Act 353, substituted in lieu of section 111 of the Act 301. The order was made, and the registrar of titles thereupon sent notice to the applicant that a vesting order had been made for the land of which the plaintiff had been trustee, jointly with the two first defendants. The notice given to the plaintiff was that the vesting order was made in the name of the defendants, Boehm, Haustorfer, and Schmidt. The vesting order was dated the 6th August, 1889, and vested the land, not in the three first-named defendants, but in the names of the first two named defendants, and that it was ordered to be registered. The plaintiff was misled by the letter sent to him. He was under the impression that the letter vested the land in the three first named defendants, but it appeared on the evidence that the order was not made vesting the land in the defendant, and the court, therefore, allowed the plaintiff to amend the statement of claim in that respect. The plaintiff has brought this action claiming an injunction to restrain registration of this vesting order and asking that the vesting order should be set aside. He rests his claim on this ground, that the commissioner of titles had no jurisdiction to make the vesting order, and if he had jurisdiction the plaintiff was entitled to be heard on the application for the vesting order. The 12th section of the Act 353 provides that :-

"Whenever any person interested in land under the operation of this act, or any estate or interest therein, shall appear to the Supreme Court or to the commissioner to be a trustee of such land, estate, or interest, within the intent and meaning of any statute now or hereafter to be in force relating to trusts and trustees, and any vesting order shall be made in the premises by the Court or the commissioner (which order he is hereby empowered to make concurrently with the said Court), the registrar on being served with such order, or an office copy thereof, shall enter in the register book, and on the duplicate grant or certificate of title, and duplicate instrument, if any, the date of the said order, the time of its production to him, the name and addition of the person in whom the said order shall purport to vest the land or

interest, and upon such entry in the register book such person shall become the transferee, and be deemed to be the proprietor thereof, unless and until some entry shall be made the said order shall have no effect or operation in transferring or otherwise vesting the said land or interest."

That section was substituted for section 111 of the principal act, No. 301. Under section 111, the commissioner of titles had no authority to make a vesting order. But leaving out words which confer on him that power, the section remains substantially the same. Under the previous section giving authority to the Supreme Court, if the Court made a vesting order that vesting order had no effect or operation as a transfer, or as vesting the land till after the mode prescribed before making the order had been made. There is no section of any act of Parliament authorising the commissioner of titles to make rules and regulations with reference to the practice to be observed under that section of the statute, and no rule or regulation has been made, promulgated by him, or made generally known to the public in reference to such application. The practice, if there is a practice, has been fixed by himself according to the necessity of the case, and according to his own motion, and without any means of giving it proper publicity. The commissioner may make a vesting order concurrently with the Supreme Court. Under the Statute of Trusts the Court has power to make a vesting order under a variety of different circumstances. The only section under which orders of this kind are made in the Supreme Court, so far as I am aware of—and it was not disputed by either plaintiff or defendant—is section 19 of the Statute of Trusts, which provides that :—

"In every case where any person is or shall be jointly or solely seized or possessed of any lands, or entitled to a contingent right therein upon any trust and a demand shall have been made upon such trustee by a person entitled to require a conveyance or assignment of such lands, or a duly authorised agent of such last-mentioned person, requiring such trustee to convey or assign the same or to release such contingent right. It shall be lawful for the Supreme Court, if the said Court shall be satisfied that such trustee has wilfully refused or neglected to convey or assign the said lands for the space of 28 days after such demand to make a vesting order vesting such lands in such person, in such manner and for such estate as the Court shall direct, and the said order shall have the same effect as if the trustee had duly executed a conveyance or assignment of the lands, or a release of such right in the same manner and for the same state."

Assuming that that section would have justified the Supreme Court in making an order vesting this land in the two first-named defendants, such an order could not have been made unless the facts necessary to found the order had been proved ; nor unless the party affected by such order, unless perhaps he was not resident in the jurisdiction, was served with the petition, motion, or whatever course was directed to bring it before the Court, so that he might have an opportunity of being heard, and showing cause why the estate vested in him should not be taken out of him. The Amending Transfer of Land Statute, No. 353, having given powers to the commissioner of titles in common with the Supreme Court to make a vesting order, the commissioner could not without authority expressly given to him to make the order in any other way than the Supreme Court could make it, it followed that he should make it in the same way. I do not know if the commissioner of titles has any jurisdiction to make the order, but if he has the jurisdiction he was wrong in the way he made it. It is a well-known rule that before any order is made against a person he should have an opportunity of being heard against it. In regard to this land a caveat had been entered by the plaintiff against any dealing with it, and it was necessary to give notice to the caveator of the vesting order against him, and such notice was, given and it was contended that upon that notice he could have taken such steps as he might have been advised to prevent the registration of the vesting order, as the vesting order was of no effect till after it had been registered, and the plaintiff had ample time to take the steps. Under section 111 of the Transfer of Land Statute, if a vesting order is made by the Court it would not have been of any effect till it was registered There is the same provision in reference to orders make by the commissioner of titles, but there is nothing to distinguish those orders from applications made under the Court under the Statute of Trusts. I have hitherto referred to the fact that the plaintiff had lodged a caveat against dealing with the dealing. But I am not aware that a person is under any obligation to enter a caveat. He was not bound to suppose that an order affecting his interest in land would be made against him. Such a system might work out a gross injustice, and might cause a man great expense to prevent registration of a vesting order. All difficulties would be avoided if the course were pursued of the person affected receiving notice of the intention to apply for the order. Although he had come to the conclusion that the plaintiff was entitled to restrain registration of the vesting order, it was said for the three first defendants that it would be rendered practically of no use. The whole of the case was gone into, and it was said that it would be found that the plaintiff had been properly removed from being a trustee. On that also I have come to a conclusion adverse to the defendants. I assumed that there was power to remove the plaintiff if his removal had been properly effected. But I have come to the conclusion that the plaintiff has not been properly removed. The meeting at which he was removed was held on a Sunday at 1 o'clock, because, one witness said, there was heavy rain. Another witness said it was because the majority wished it to be held at that hour. But the meeting was announced to be held at three o'clock, and under the rules of the congregation notice of the time of such meeting should be held. At the same time I think

the plaintiff's refusal to obey the resolutions of the congregation might have been a good cause for his removal. I will grant the order to restrain the registration order made by the commissioner vesting the land in the first two defendants, and I direct the three defendants, Boehm, Haustorfer, and Schmidt, to pay the plaintiff's costs, no costs against the registrar of titles.

Judgment for the plaintiff, with costs against the defendants, Boehm, Haustorfer, and Schmidt.

Solicitors: For plaintiff, *Farmer and Twigg;* for the three first named defendants, *Fox and Overend* for *Cathcart;* for the Registrar of Titles, *Crown Solicitor.*

PROBATE JURISDICTION.

(Before Hood, J.)

IN THE ESTATE OF THOMAS W. WATSON, DECD.

Feb. 20, 21.

Practice Probate—Administration—Leave to expend infants' capital on their maintenance, etc.—Substantive motion.

An application was made for (inter alia) a grant of administration and for leave to expend infants' capital on their maintenance, etc. The court entertained the application for leave to expend on the same motion as the application for a grant of administration.

Motion for a grant of letters of administration; for leave to dispense with sureties and for leave to expend the capital of infants towards their maintenance.

Thomas William Watson died intestate on the 4th Dec. 1889 leaving him surviving his widow (the present applicant) two sons at the ages of 11 and 9 years respectively and three daughters of the ages of 7, 5, and 3 years respectively. The intestate's estate consisted solely of personalty and was sworn under L1,500; the debts amounted to L40, unsecured and L500, secured.

Moule, in support, as to dispensing with sureties; *re Wyld* (6 V.L.R. (I.P.M.) 83); *re Ellis* (1 W. and W. 191). It is usual to make an application for leave to expend capital on a substantive motion; there, however, does not seem to be any objection to its being made on the motion for a grant of letters of administration; it is a saving of expense and moreover the court would not direct payment of past maintenance *re Orton* (14 V.L.R. 190); if the motion should be made substantively expenses would be incurred before the application would be heard; as to the form of order see *re Orton.*

HIS HONOR granted the application for administration, reduced the amount in which the sureties should justify to L500, and directed that the administratrix should be at liberty to deduct from the capital of the share of each infant such sums as would with the income of such share from time to time make up the following sums L20 per annum for each of the sons and L18 per annum for each of the daughters until they should severally arrive at the age of 16 years or until further order of the Court. ⅛th costs to be deducted from each infant's share. Costs as between solicitor and client.

Proctors, *Moule and Seddon.*

SITTINGS IN BANCO.

(Before Higinbotham C.J., Williams, Holroyd and Kerferd, J.J.)

HITCHINS V. THE MAYOR, ETC., OF PORT MELBOURNE.

4 Nov.

Local Government Act 1874 *(No.* 506*) s.s.* 380 399—*Liability of Council for the dangerous condition of a road place under its care and management—a municipal corporation having knowledge of the unauthorized act of a stranger which does damage to the natural surface of a highway within its jurisdiction which has not been formed or made is not liable in damages to a person injured through the act of the stranger.*

Appeal from the judgment of *a'Beckett, J.*

This was an action in which the plaintiff Mrs. Hitchins sued the defendants on behalf of herself and her children for damages for the death of her husband caused by the alleged negligence of the defendants in permitting a dangerous excavation to remain unprotected in Rouse Street, Port Melbourne The action was originally tried before *Webb, J.*, when it appeared in evidence that Rouse Street where the accident occurred had never been made or formed though proclaimed as a highway. It further appeared that the excavation in question had been made by the Board of Land and Works. The Full Court held on a question reserved on the facts by the primary judge that the defendants were not liable but two of the members of the Court *Williams, J.*, and *Holroyd, J.*, intimated that if the statement of claim were amended by adding a count, to the effect, that the defendants knew of the excavation at the time it was made and having the means and ability and opportunity took no steps to prevent it, on a finding against the defendants on this count they might be made liable. See 10 A L.T. 122. The statement of claim accordingly was amended by adding a count that in the year 1881 the Board of Land and Works made a dangerous excavation in Rouse Street and that the defendants knew at the time the excavation was made the board was making it and took no steps to prevent it. The case was re-tried before a'Beckett, J., who gave judgment for the defendants and from this judgment the plaintiff now appealed. This judgment is reported in 10 A L.T. 277.

Mr. Goldsmith for the appellants. By sec. 380 of the *Local Government Act*, 1874, the Council has the care and management of the roads in the Municipality and that section gives them power to prevent the creation of a nuisance and they are liable for not doing so. *Mayor of Emerald Hill v. Ford* 9 V.L.R.

L 351. "Care" imposes some duty and they are liable for not filling up a dangerous hole. Sec. 399 compels the Council to keep open and free from obstruction all roads in their district. The Board of Land and Works were mere trespassers and this excavation was a nuisance which the council, under sec. 399, should have prevented. The following authorities were also referred to, *Borough of Bathurst v. McPherson*, 4 App. Cas. 256: *Burgmeier v. Shire of Darebin*, 5 V L.R. L 351: *Grieve v. Mayor of Melbourne*, 1 W.W. and A'B. L 95 and *McKinnon v. Penson* 8 *Exch*, 327.

Mr. Hood, Mr. Isaacs, and Mr. Bryant for the respondents. The council is not liable for the condition of a road till it is formed and made, *Scott v. Mayor of Collingwood*, 7 V.L.R. L 280. There is a great difference between a road in a state of nature and one formed by the council: the council is not liable for injury through a hole on the former, *Dodd v. Shire of Berwick*, 11 V.L.R. 743. Sec. 399 applies only to obstructions by adjoining owners and not to acts of strangers. They cited the following cases: *Reed v. Mayor of Fitzroy*, 4 A.J.R. 109: *Ryan v. Mayor of Malmsbury*, 1 V.R L 23; *Dunmelow v. Mayor of St. Kilda*, 5 A.J.R. 74, and the *President of the Shire of Barrabool v. Torr*, 2 V.R. L 65.

C.A.V.

HIGINBOTHAM, C.J., read the following judgment.—This case comes before us on appeal from the judgment of A'Beckett, J. It was held by this Court upon a question reserved on facts found by the primary judge, Webb, J., at the first trial of this case, that the defendants were not guilty of negligence in "permitting Rouse-street to be and continue and for a long time remain out of repair, and in a state and condition dangerous for foot passengers by reason of an excavation thereon, which was left by defendant unprotected and without any light at night." This street was never formed or made by the defendants at the place where the accident occurred, and the decision of the Court was based upon the rule first laid down 25 years ago in the case of *Grieve v. The Mayor, &c., of Melbourne*, I W.W. & A'B. (L.), 95, that a municipal corporation is not answerable for the foundrous and unsafe condition of any of the streets or roads placed under the care and management of the council of the corporation until and unless the council has exercised the discretion held to be vested in it, and altered the natural condition of the street or the road by forming or making it. This rule of legal interpretation has been applied from that time to the present to the successive acts of Parliament by which the care of streets and roads has been vested in the councils of boroughs and shires, and the liability of the corporation has been held to be limited to those parts of unmade streets and roads which the council has elected to form or make. *Dodds v. President, &c., Shire of Berwick*, 11 V.L.R., 743; *Bazeley v. Shire of St. Arnaud*. After the decision on the question reserved, and before judgment, the plaintiff was allowed to amend the statement of claim by adding a new cause of action, which has been stated to be that about the year 1881 the Board of Land and Works made a dangerous excavation in this street, and that the defendants knew at the time the excavation was being made that the board was making it and took no steps to prevent it. At the second trial the learned judge arriving on the other questions in issue at the same conclusions of fact as had been found at the first trial, held that defendants were not under a legal obligation to prevent an injury to an unmade street which they would not be bound to repair after the injury had been done, and that the defendants were entitled to the judgment of the Court upon this ground. I am of opinion that the learned judge was right in this view. The proposition that a municipal corporation having knowledge of the unauthorised act of a stranger which does damage to the natural surface of a highway within its jurisdiction which has not been formed or made is liable in damages to a person injured through the act of a stranger is a proposition now advanced for the first time, and is wholly unsupported by judicial decision. The asserted liability appears to be inconsistent with the rule which exempts the corporation from the charge, and from the consequences of negligence for not repairing an unmade street which is dangerous to travellers through natural causes or from the act of man. If there be no obligation in either case to repair the damage, it would seem that there can be no duty to prevent the damage. I agree with the primary judge that the statute which prescribes the duties of the council affords no warrant for the proposition now contended for. Section 380 of the Local Government Act 1874 provides that the council shall have the care and management of all public highways, streets, roads, bridges, culverts, ferries, and jetties within the municipal district. But these words, according to the well-established interpretation that has been placed upon them, create and impose on the council no active duty of care or management until the highway, street, road, bridge, culvert, ferry, or jetty has been made and prepared for public use by the discretionary act of the council. The only statutory duty cast upon the council in respect of surveyed, reserved, and proclaimed highways before formation is to open them and keep them open for public use except in cases where a license has been granted to close them (Section 399). The performance of this duty involves no obligation either to prevent or to repair damage done to the natural surface by the act of a stranger which, while leaving the highway open for public use, may increase the risk of travellers who use the highway. Whether the council had or had not the ability under the circumstances disclosed by the evidence to perform this alleged duty is a question of fact on which no finding has been given. The plaintiff has not alleged that the council was prevented by *vis major* from performing the duty. If an absolute duty existed in law, the corporation would be liable in all events for non-performance of it by the council. If, on the other hand, the duty be conditional upon the ability of the

council under existing circumstances to perform it, it would lie upon the plaintiff to show that the council could certainly and without resort to force or expensive and uncertain litigation have prevented the Board of Land and Works from making the excavation. As the learned judge held that no duty absolute or conditional existed, it was unnecessary to arrive at a finding upon this question of fact. I am of opinion that the learned judge was right in his interpretation of the law. The Court being equally divided in opinion, the judgment of the Court will be that the appeal be dismissed, without costs.

WILLIAMS J.—I see no reason whatever for departing from the judgment delivered by me in the same case when it was argued on a previous occasion. I adhere to every word I uttered in that judgment; it is therefore unnecessary to repeat my judgment for if I were to say what I thought I should simply repeat what I have said in 14 V.L.R. 765, 766, 767. But I wish to state that the proposition as now put forward, which was said to be the proposition on the first hearing has not been correctly stated. To say that the proposition was the bald proposition that the municipal council when a stranger interfered with and destroyed some works in the municipality was bound to take steps to prevent the destruction was only stating half the proposition. The proposition stated distinctly was that there was a duty and an obligation cast upon the council having knowledge that a stranger was destroying a highway in the municipality, which was by section 380 placed under their control and management, where they had the means and ability and opportunity of preventing it, not to allow such destruction. It was said in the course of the judgment of the majority of the Court on that occasion that there was a fact necessary to be found in order to sustain the suggested amendment of the pleadings, namely, that the present defendants had the means and ability and opportunity of preventing this wholesale destruction by a stranger of the road placed under their care and management. I should have thought that the judgment of the majority of the Court was plain to intimate that if the claim was amended a finding on that question was necessary. The primary judge has, however, come to no finding on that point. There has been no finding on that question of fact, and, if it had not been for the view taken by two of the judges on this occasion, there would possibly have to be another rehearing, inasmuch as the facts necessary to support the judgment of the majority of the Court on the previous hearing have never yet been found.

HOLROYD, J., I have only to say that I entertain the opinion which I expressed when the case was argued last time, and I have nothing further to add to what I said then.

KERFERD, J., read the following judgment: This action has been tried twice. On the first occasion a case was reserved for the full court by Webb, J., and the Full Court decided that the defendants were not guilty of negligence on the statement of claim, but allowed the plaintiff to amend the statement of claim and to go down to trial again. On the second occassion it came before a judge sitting without a jury, and a'Beckett J., gave judgment for the defendant, but he contingently assessed the damages for the plaintiff at L600 and costs if the full court should be of opinion that the plaintiff was entitled to judgment. The case now comes before the full court on notice of appeal that the judgment of a'Beckett, J., may be reversed, and that judgment may be entered for the plaintiff for the sum of L600 and costs. The facts briefly are that the deceased, who was a solicitor in practice in Melbourne, left his residence in Green Street, South Melbourne, on the evening of March 21, 1887, between 7 and half-past 7, accompanied by his daughter. In a short time she returned without her father, and the plaintiff (the deceased's wife) went in search of him, and found him in an excavation in Rouse-street, with his leg broken. The deceased was taken to the Hospital, where he died from gangrene on the 27th March, 1887. The plaintiff says the deceased was quite sober. Mr. Justice Webb, upon the occasion of the first trial, found the following facts, viz.: That Rouse-street, where the accident happened, was a public highway within the municipality; that, while it was a public highway, the Board of Land and Works caused a hole to be made in it, and material from the hole to be removed; that the deceased, while lawfully using the highway, fell into such hole, and his death was thereby caused; and that the defendants had never formed or made the portion of the street where the accident happened. a'Beckett, J., before whom the second trial took place, says in his judgment:—

"It has been contended for the defendants that the work was done by authority of the Crown, and therefore that they could not have stopped the work. I have been referred to appropriation acts authorising expenditure for the purpose. I do not regard these acts as making the purpose legal, but on this and other evidence it appears that the board was acting, not as an independent corporation, but under the direction of the Government."

On the statement of facts in this case we have to determine whether this action for negligence will lie against the defendants for not restraining the Board of Lands and Works from making a dangerous hole in Rouse-street, and, further, for not filling the hole up, or for not fencing it off with a sufficient fence so as to prevent the public from being injured by falling into it. The law is now well settled that if the defendants have been guilty of omission to perform a statutory duty, and some person has by reason thereof been injured, an action for negligence will lie against them at the suit of the person so injured. (See *Borough of Bathurst v. Macpherson*, 4 App., Cas. p. 267). The general rule, as laid down in *M'Kinnon v. Penson* (8 Ex. 327), is approved of in the Borough of Bathurst case, and also in *Gautret v. Egerton* (L.R., 2 C.P., 371). To determine whether the defendants have been guilty or not of a breach of the statutory duty, it will be necessary to examine and consider the provisions of the local government acts. The numerous English cases found in the books which have been decided upon the English turnpike acts throw little or no light upon the proper construction to be placed upon the provisions of our local

government acts. The plaintiff relied upon section 380 of the Local Government Act 506, which is as follows: —"The council of every municipality shall have the care and management of all public highways, streets, roads, bridges, culverts, ferries, and jetties within the municipal district; and section 5 of that act interprets the word street, save where there is something in the context inconsistent therewith—"Street and road respectively shall mean a street or road being a public highway, and shall include every public highway." The street, the subject of this action, was in its natural state, and, except as to the hole made in it, was in the same condition that it was on the date of its proclamation and consequent dedication to the public as a public highway under the provisions of sections 363 of Act 506. In the case of *Scott v. the Mayor of Collingwood* (7 V.L.R., L 280), in which all the earlier cases under this act were considered, Stawell, C.J. at page 286, said, "In those cases in which the Court has decided that if a corporation does not begin to repair a street they are not answerable for the condition in which it is left by nature, I entirely concur." Stephen, J., concurred with him, and Higinbotham, J., at page 287, said, "With regard to the exercise of the powers given to the council by the act of Parliament, the decisions have established the rule that so long as the power of making a road or street remains wholly unexercised, so long as the soil is left in its natural state, the council cannot be compelled to exercise the power, and the corporation is not liable either to an indictment as for a nuisance, or to an action for injuries suffered by passengers through the unformed state of the highway." The case of *Scott v. Mayor of Collingwood* has been always followed since, and may be regarded as the leading case on the point it decides. In *Gautret v. Egerton*, to which I have referred, Willes, J., says substantially the same thing: "If I dedicate a way to the public which is full of ruts and holes, the public must take it as it is. If I dig a pit in it I may be liable for the consequences, but if I do nothing I am not." But these cases leave untouched the new ground broken in this case. The street has not been left in the condition it was by nature; the soil has not been left in its natural state; a pit has been dug in it, not by the defendants but at the instance of the Crown, who granted the land dedicated as a street. The question now raised is. Have the defendants any statutory duty with regard to streets not taken over by them, and made in pursuance of the provisions of the Local Government Act? Do the words "shall, have the care and management" in section 380 refer to and include streets proclaimed and dedicated as such, but not made? The word "street" would convey the meaning, when used in its ordinary sense and apart from any context which might control its meaning, that it was a street "formed and made." The meaning assigned to it in the *Imperial* and in *Webster's Dictionaries* is a "paved way or road"—"a city road." Section 5 already referred to provides that, unless there is something inconsistent with the context, "street" shall mean a street being a public highway. The interpretation does not throw much light upon the meaning of the word "street." Both the words "street" and "highway" are words of ambiguous meaning. They are used in the Local Government Act to describe land dedicated for the purpose of being used as streets or highways and they are also used to describe streets and highways which have been formed and made. The meaning which the Legislature intended to attach to the word street in each case must, I am of opinion, be inferred from the heading and sections ranged under the heading in which the word "street" is used. The Local Government Act, by section 2, is divided into parts and subdivisions, and the headings are therefore made part of it. There are 32 parts in all, and several of these parts are again divided into numerous subdivisions, containing provisions providing for the exercise of powers as to a great variety of subject matter delegated by the act to the councils of municipalities to deal with. Part 16 deals with streets, roads, bridges, ferries, culverts, watercourses, and jetties, and this part is divided into nine subdivisions:—1 Dedication of streets, &c., sec. 363-370. 2. Opening of private roads in shires, sec. 371-373. 3. Appointment of control of bridges and ferries, sec. 374. 4. Making and maintenance of streets, roads, bridges, ferries, culverts, watercourses, and jetties, sec. 375-389. 5. Making and maintenance of streets, roads, bridges, and ferries on the boundaries of municipal districts, sec. 390-397 6. Obstruction of streets, roads, &c., sec. 398-402. 7. Fixing the level of streets, private streets, filling up of low ground, sec. 403-418. 8. Tolls, sec. 419-431. 9. Main roads and common toll roads, sec. 432-438. I am of opinion that the Legislature in dividing the act into parts, and grouping together cognate sections under various headings, intended that the words in those sections and the sections should be construed as relating to the subject matter of the headings under which they were ranged. The 380th section, relied upon by the plaintiff is contained in the 4th subdivision, the heading of which is "Making, maintenance, and management of roads, and bridges, ferries, culverts, watercourses. and jetties." Now, if we construe the different sections comprised under the 4th subdivision, as relating to the heading of that subdivision, we find that all the sections deal with subject matters which fall under the several words constituting the heading of the 4th subdivision, viz.: Making, maintenance, and management. The words in section 380, "care and management," would be consistent with the view that the Legislature intended to give power to the council, and to impose a statutory duty upon it to preserve its own works upon streets which it had taken in hand to make, and those words, in this view, would have no application to streets which had not got beyond the stage of being "land reserved, used, or acquired by purchase or exchange," and dedicated to the public by proclamation, but which had not been taken in hand by the council to make. The group of sections under the heading to the first subdivision of part 16, "Dedication of streets, &c.," will be found on examina-

tion to deal only with the dedication of land reserved, used, or by purchase or exchange acquired for a street, road, highway, &c., to be a public highway. These sections may be regarded as enabling sections, and are confined to the subject matters naturally falling under the heading "Dedication of streets, &c.," but make no provision for "care and management" of them, and vest the absolute property in the land dedicated as streets in the Crown. If the Legislature had intended to cast a statutory duty upon the council of the municipality with reference to streets in their natural state under subdivision 1, part 16, "Dedication of streets, &c.," some provision would have been inserted in that division, describing the nature of the duty imposed upon the council, but there is no such provision. In view of the provisions made by the Local Government Act for the protection of streets, I think it may be inferred that the Legislature considered that no further provision was necessary. Section 212 extends to every borough the provisions of part I. Act 265, called the Police Offences Statute. 1865, imposing a penalty, not exceeding L20, for offences which may be committed on streets, or interfering with streets. Section 370 declares that the absolute property in the land proclaimed as a street shall be vested in the Crown. The mode of construing the great body of law contained in our Local Government Acts which I have ventured to adopt enables each of the headings under the parts the act is divided into to be construed, if necessary, for the purpose of ascertaining the meaning of the words and sections ranged under it as if it were a separate enactment. There is authority for so doing. The case of *Eastern Counties Railway Company v. Marriage* (9 H.L.C. 32) was decided upon the construction to be placed upon 8 and 9 Vict., Ch. 18. The frame of this act is very similar to the frame of our Local Government Act. It was an Act consolidating in one act certain provisions usually inserted in acts authorising the taking of lands for a public nature. The act was divided under 15 separate and distinct headings, dealing with a variety of subject matters, and contained 153 sections in all. It appears to me that the observations made by some of the learned judges in the case of *Eastern Counties Railway Company v. Marriage* as to the proper construction to be placed upon sections under different headings apply with equal force to our Local Government Act. Channell, B., at page 41, said—

"These various headings are not to be treated as if they were marginal notes, or were introduced into the act merely for the purpose of classifying the enactments. They constitute an important part of the act itself. They may be read, I think, not only as explaining the sections which immediately follow them, as a preamble to a statute may be looked to, to explain its enactments, but as affording as it appears to me a better key to the constructions of the sections which follow than might be afforded by a mere preamble."

Bramwell, B., at page 46, referring to one of the headings, said—

"This general heading is not only in good sense, but as a matter of verbal accuracy to be considered as governing, and to be read before, each section which ranges under it, as though they had been numbered 1, 2, and so on. This is manifest from an examination of the statute."

Lord Wensleydale, at page 68, said—

"Various clauses relating to each separate subject are collected under various heads, with an appropriate heading to each class, which must apply to the whole of that class to which it is the heading. . . . The effect is the same as if, as my brother Channell, in his able argument, has observed, the heading had been repeated, as it would have been in the more prolix form which prevailed in older statutes, at the head of each section."

For the reasons I have already stated I am, therefore, of opinion that this action will not lie against the defendants. In this view, it is unnecessary for me to consider the defendants' further defence under the plea which raises the question whether the hole made in the road by the Board of Land and Works was an act done by the Crown under the provisions of section 389. which enables a Minister of the Crown, upon obtaining an order of the Governor-in-Council, to take over, construct, maintain, and repair any road within the borough, and have and exercise powers similar to those had and exercised by the council with regard to such road, and further, whether any wrong which has been done to the plaintiff is a wrong done by the Board of Land and Works and not by the defendants.

Appeal dismissed without costs. Judgment for defendants.

Solicitor for appellant, *Morgan*; solicitors for respondent, *Emmerson & Barrow.*

(Before Higinbotham C. J., Williams and A'Beckett J. J.

CHIRNSIDE v. KEATING.

12th Nov.

Action for the recovery of money paid under a mistake of fact—in such an action if the position of the defendant has been altered by the plaintiff's mistake he must be placed in statu quo ante before the plaintiff can recover—Admissibility of oral evidence to control a written agreement.

Argument on points reserved at trial by *Williams*, J.

In this case the plaintiff sued the defendant for £290 being the amount of the purchase money of defendant's interest in a certain leasehold. It appears that some time after the purchase the plaintiff discovered that this land was really his own property and that by a mistake of the Lands Department it had been treated as unalienated crown land and thrown open to selection and selected by the defendant in ignorance of the mistake. The defendant claimed to be entitled to a deduction for the growing crop and permanent improvements executed by her. The contract of sale was as follows:—"Memorandum of agreement made the 21st day of July 1888, between Mary Keating of the one part and Robert Chirnside . . . . of the other part whereby the said Mary Keating agrees to transfer and the said Robert Chirnside to take all the leasehold interest of the said Mary Keating under a lease from the Crown of 40 acres . . . . for the sum of £290." The learned primary judge found as facts (1). The L290 was paid under a mistake of fact under the belief that the defendant had a leasehold title to the lands whereas they were the plaintiff's

freehold. (2). I think looking at the agreement alone the plaintiff paid L290 for the defendant's interest in the leasehold. (3). If I am at liberty to go outside the agreement part of the consideration was for the defendant's crops.

His Honor reserved the following questions for the opinion of the Full Court.

(1). Is it permissible to go outside the agreement to ascertain what the L290 was paid for?

(2). If so how should judgment be entered? for whom and in what form?

The other facts of the case are fully stated in the judgment of the Chief Justice.

Mr. *Isaacs* with him Dr. *Madden* for the plaintiff.

The agreement is clear on its face and no evidence can be given to vary or contradict it. The defendant's expenditure was incurred before the plaintiff discovered the mistake. The mere fact that the person paying the money had at the time of payment means of knowledge of which he neglected to avail himself will not disentitle him to recover the money back if it was paid under a real mistake; the only limitation is that he must not waive all enquiry. *Townsend v. Crowdy*, 8 C.B.N.S. 477.

Mr. *Higgins* for the defendant.

The defendant incurred expenditure on the plaintiff's property under the mistaken belief it was her own. The plaintiff cannot recover now the purchase money of this property without deducting the increase of its value owing to the defendant's expenditure. *Munro v. Sutherland*, 5 A.J.R. 74.

The following cases were also referred to. *Jones v. Chapman*, 2 Exch. 820; *Vyryan v. Vyryan*, 30 Beav. 56; *Wilson v. Stewart*, 11 A.L.T. 30; *Cooper v. Dangerfield*, 10 V.L.R. 4 196; *Carrington v. Roopes*, 2 M. & W. 248.

C.A.V.

Higinbotham, C.J. I have the misfortune to differ from my learned brothers in the opinion I have formed of this case and it is my duty therefore to state the grounds of my judgment. The plaintiff sues the defendant in this action to recover the sum of L290 paid to the defendant by the plaintiff on August 21st 1888 as the purchase money of defendants leasehold interest in 40 cases of improved land with a crop of wheat and oats growing thereon. The learned judge has found as a fact and it cannot be doubted that the plaintiff made the payment under a mistake of fact and in ignorance that the land he was buying was his own and was not the defendants. The land had been alienated by the Crown in fee in February 1872 and the plaintiff deriving title through his father became the registered proprietor in fee simple under the Transfer of Land Statute on May 30th 1885. The plaintiff forgot this fact when he paid the money, and his ownership of the land was not discovered until a month after he bought it by a clerk of his solicitors. This forgetfulness by the plaintiff of his right, lasting during 18 months that he resided on the spot previously to the agreement, has not been explained by him. The judge has not found that the plaintiff's forgetfulness was the result of negligence, and I think that we are not at liberty to attribute the plaintiff's inactivity to that cause. But it was attended with serious consequences to the defendant. The Lands Department also made a mistake and left open this land for selection under the Land Act. The defendant selected it, and after the plaintiff became the registered proprietor, obtained a lease of the land on January 1st 1886. It is admitted by the plaintiff and there is no possible room for doubt that the defendant believed the lease to be a valid and effectual lease and that she proceeded to fence and cultivate the land in the *bonâ fide* belief that she had a good title. The plaintiff looked on for 18 months in ignorance, which we must assume to be real ignorance, that the land which the defendant was improving and cultivating belonged to him and not to the defendant. After the discovery was made in September 1888 the plaintiff left the defendant in possession until harvest time. He then took possession of the land and reaped the cost telling the defendant through his manager that he would not pay for it. He kept the proceeds and he then brought this action to recover the whole of the money he had paid under a mistake for the defendant's interest in the land. We have to determine what legal and equitable rights the plaintiff has under these circumstances to recover all or any of the purchase money. The plaintiff cannot be in a better position in this action then he would have been if he had made no mistake and were now proceeding to recover his property in a court of law or of equity. Having paid this money by mistake he should not be allowed to gain a profit by his mistake that he would not have been entitled to if he had made no mistake. What then would be the rights of the plaintiff if there had been no agreement for sale and if the plaintiff had not discovered that the land was his until after the defendant had reaped the crop. If a stranger build on or otherwise improve the land of another supposing it to be his own, and the true owner knowing it to be he does not interfere but leaves the stranger to go on, Equity considers it to be dishonest and fraudulent in the owner to remain passive and afterwards to interfere and claim the profit. If on the other hand a stranger builds on or otherwise improves the land of another knowing that the land is not his own, there is no principle of Equity which prevents the owner from insisting on having back his land with all the additional value which the occupier has imprudently added to it. Per Lord Wensleydale in *Ramsden v. Dyson*, L.R 1 E., & Ir. App., at p. 168. But there is a third class of cases within which the present case falls in which both parties are free from intentional wrong, each acting under a mistaken impression produced by different causes. In such a case the stranger who occupies and improves the land of another is in law a trespasser because the land is not his, but he acts under a *bonâ fide* and reasonable belief that the land is his. The owner also, although he remain passive, is not open to the charge of fraud or dishonesty, because he has forgotten and is ignorant of his right. The rule that has been followed in Courts both of Law and of Equity in such a case has

been to allow the owner to recover his property with all the improvements which have been added to it by the stranger, and to make to the latter although a trespasser all just allowances for the expense and trouble he has been put to in improving the owner's land. In *Wood v. Morewood*, 3 Q.B. 440 (note) an action for injury to the reversion of the plaintiffs in making holes and excavations and getting coals, with a count in trover for coals, Parke, B., directed the jury that if there had been fraud or negligence in the defendants they might give the plaintiff the value of the coal at the pit's mouth; but if the defendants had acted fairly and honestly they should award the value of the coal in the mine, that is, deducting the expense of getting and raising the coal. This direction was approved in *Hilbon v. Woods*, L.R. 4 E. 432. See also *Llynvi Co. v. Brogden*, L.R. 11 Eq. 188; and *Munro v. Sutherland*, 5 A. J.R., p. 75. In the last mentioned case the authorities are collected, and the principle of the rule which is equally applicable to real and to personal property is stated to be that one man should not be enriched by the labour of another if that labour has been expended under a *bonâ fide* belief of the existence of a title to the thing produced.

Two questions have been reserved for the determination of this Court—First, whether it is permissible to go outside the agreements in order to ascertain what the £290 was paid for; and, second, if it be permissible then having regard to the findings how should the judgment be entered, and for whom, and in what form? The evidence objected to was an agreement in writing between the father of the defendant and the plaintiff, dated the same day, August 21st, 1888, as the agreement between the plaintiff and the defendant. This was offered for the purpose of proving that a certain part of the L209 was paid for the crop, it appears not to have been received in evidence and it would be I think properly rejected. Apart from this evidence the defendant called witnesses to speak to the value of the crop and the plaintiff's overseer was called for the same purpose. The evidence of all these witnesses was received without objection, and I think it was properly received. It was one of the material facts in this enquiry what would be a just allowance to the defendant in respect to the growing crop and what deduction should consequently be made on this account from the whole sum claimed by the plaintiff. This evidence did not go to detract from or invalidate the agreement in writing but to establish a material fact which would enable the Court to ascertain the respective proportionate values of the parts of which the subject matter of the instrument was composed. In answer to the second question, I say that in my opinion the judgment should be entered for the plaintiffs for such part of the L290 as shall remain after all just allowances have been deducted therefrom for all permanent improvements made by the defendant while she was in occupation by fencing, cultivating, and manuring the land, and for the value of the standing crop at the time the plaintiff took possession of the land. In the latter allowance there should not be included the cost of reaping and gathering in the crop as this was borne by the plaintiff and not by the defendant. If the evidence already given should not enable the Court to arrive at a satisfactory estimate of all just allowances, and the parties cannot agree upon the amount an account or enquiry should be ordered to ascertain what would be the total amount of all just allowances. This could necessarily be less than the whole sum of L290, which included the defendant's leasehold interest in the land unimproved and uncropped. The plaintiff therefore would be entitled to judgment for some amount which remains still to be assessed.

WILLIAMS, J.—I think judgment should be entered for the plaintiff for L290. If I could take a more favourable view for the defendant my inclination would be to do so. The L290 was undoubtedly paid by the plaintiff to the defendant under a mistake of fact in buying his own property. No doubt if that mistake had altered the position of the other party he would not be allowed to recover this money without putting the defendant *in statu quo ante*—if that mistake had caused the defendant to incur any expenditure the plaintiff could not recover the money without allowing the defendant a deduction for such expenditure. In this case, as I look at it, I cannot see any evidence that the plaintiff's mistake in any way altered the position of the defendant or that his mistake contributed to her expenditure at all; her expenditure had all been incurred before the plaintiff paid the money and before he bought from her this land which was in reality his own, and I think it is a necessary conclusion of fact that her expenditure was caused by the Lands Department and by them alone. The Department made a mistake in assuming this land to be unalienated Crown land and opening it for selection and under their mistake the defendant got a lease of the land and expended her money on it, and all her expenditure had been incurred before the plaintiff bought his land back. That is the principal ground on which I differ from the Chief Justice. As to the general principle of recovering back money paid by mistake of fact, it is clear that if the position of the defendant has been altered by the plaintiff's mistake he must be put in *statu quo ante* before the plaintiff can recover; but I can see no evidence to justify me in applying that principle to this case. Apart from that ground I do not think this action can be put on the same footing as if the plaintiff were bringing an action to recover the land or for mesne profits: in such a case it might be that in the doctrine of law shown in *Munro v. Sutherland* he could not recover the land or mesne profits without making a deduction for improvements. That might be so, I do not say it is so. With reference to the first question I think it is not permissible to go into evidence outside the agreement, for the reason that that document clearly shows the plaintiff paid L290 for the defendant's leasehold interest; there is no ambiguity in the agreement, and to allow evidence to vary it is not permissible. The second question it is unnecessary to answer owing to my finding on the first.

A'BECKETT, J. I agree generally with the judg-

ment of my brother *Williams*. I think in this action a count for work and labour by the defendant cannot be considered as a claim enforceable at law as the expenditure was not induced by any act or default of the plaintiff and it would be a dangerous extension of the principle which applies where one person has inferentially encouraged another to spend money on his land to apply it to a case where the expenditure is incurred not through the fault of any owner but of a third party, the Crown in this instance. That being so, so far as it is necessary to express any opinion I should say that had this been an action in which the plaintiff sought to recover the land from the defendant, on the facts of this case she could not successfully say "you shall not get back this land unless you pay me the money I have expended on it and which may be of advantage to you." I think the fact that she had expended money without any default on the part of the plaintiff would not give her any claim in a court of law for compensation and if she could not enforce such a claim as a plaintiff she could not as a defendant. I think such a claim has never yet been recognized and it would impose on owners a duty which does not lie on them, to be vigilant in watching their property so that no person should through inadvertance improve it; no such duty exists at law or equity. *Question answered in favour of plaintiff.*

Plaintiff's solicitors, *Taylor, Buckland* and *Gates*; defendant's solicitors, *Morgan* and *Gill*.

IN CHAMBERS.

(Before Hood, J.)

RE HEATHER.

25th Feb.

Local Government Act 1874 (*No.* 506) *ss.* 54, 71—*Ouster from office of a councillor concerned or participating in the profit in or of a contract with the municipality.*

Order nisi calling upon Mr. Edward Drinkall Heather to show cause why he should not be ousted from the office of councillor for the city of South Melbourne now held by him on the ground that at the time of his election and ever since he was and still is concerned or participating in the profit in or of a certain contract with the municipality; to wit a contract made by and between the trustees for the time being of the South Melbourne Mechanics' Institute and the Mayor, councillors and citizens of the municipality and bearing date the 9th May, 1887.

The application was made at the instance of Mr. Robert Kilpatrick of Clarendon Street, South Melbourne, commission agent. It appeared that on the 12th August, 1889, an election was held for a councillor for Queen's Ward, in the City of South Melbourne. There were two candidates, Mr. Kilpatrick and Mr. Heather. Mr. Heather obtained the majority of votes, and was declared duly elected, and he afterwards took his seat at the council table, and has since acted as councillor. Mr. Kilpatrick said that prior to the election he informed (Mr. Heather) that he was interested in a contract with the municipality, and therefore not qualified, and that if he took his seat he (Mr Kilpatrick) intended to take proceedings to oust him. Mr. Heather replied that "You will not find it easy to put me out of office." Mr. Kilpatrick said that on the 9th May, 1887, the Municipal Council of South Melbourne agreed to take from the trustees for the time being of the South Melbourne Mechanics' Institute a room in the building of which they were trustees. The room was to be used for a free library. The municipal council was to pay the trustees £250 per annum; but a sum of £120 was to be expended by the landlords in books, periodicals, &c.; the landlords were also to provide the necessary cleansing, lighting, and fires, and to pay all taxes. The municipal council was to receive the annual grant voted by Parliament for public libraries and mechanics' institutes. Mr. Heather is the paid secretary of the South Melbourne Mechanics' Institute. It was stated that he was the secretary at the time the contract with the trustees was entered into, and that he was present at the meeting of the municipal council when the contract was agreed upon. Mr. Heather stated to Mr. Kilpatrick that he was paid for his services as secretary by receiving 15 per cent. on all moneys received by the trustees, including the £250 from the municipal council. It was therefore submitted that under section 54 of the Local Government Act 1874 Mr. Heather was disqualified from being a councillor, as he was interested in a contract made with the council. In reply Mr. Heather made an affidavit to the effect that the South Melbourne Mechanics' Institute was an association established in the year 1857, and since that date has been continuously in existence, and had for its objects the diffusion of literary, scientific, and other useful knowledge among its members, &c. The association consisted of ordinary, life, class, and honorary members, ordinary members paying a subscription. Mr. Heather said that he had been continuously for the last 14 years an ordinary member of the association. There were on 1st January, 1887, 310 members of the association, but since the opening of the free library the number had decreased to 250. He had been paid secretary to the association since 1881, and the remuneration granted to him as such was £150 per annum, and £15 per cent. on all subscriptions, lettings and other sources of income. The contract made to let a room to the municipality for a free library was one for the general benefit of the association called the South Melbourne Mechanics' Institute. Mr. Kilpatrick had been a member of the institute or association since 1885. The council of South Melbourne consists of 15 members, and 12 of such members are also members of the Mechanics' Institute.

Mr. Isaacs moved the rule absolute.

Mr. Mitchell to show cause. The application is made under secs. 54 and 71 of the *Local Government Act* 1874. It is contended that this contract was entered into by the association and therefore the pro-

viso of sec. 54 comes in and the first part of the section does not apply. In Sweets' Law Dictionary at page 71 the word "association" is defined as "a word of vague meaning, used to indicate a collection of persons who have joined together for a certain object. It is applied sometimes to large partnerships or unincorporated companies, and sometimes to corporations formed not for profit, but for some scientific, charit able, or similar purpose" this institute is clearly within that definition. Here L250 is paid to the association and the members get the benefit. The property if vested in the trustees for the benefit of the institute. If it is not for the benefit of the association then Mr. Heather is not interested in the matter and therefore does not come within the section. The committee of management employ Mr. Heather. The trustees are simply trustees of the land for the benefit of the association.

Mr. Isaacs.—The trustees are not the association at all, they are only trustees of the building and land as shown by Act No. 547. They have nothing to do with the income. Mr. Heather is employed by the committee of management and not by the trustees Lord Esher M.R. in *Mitton v. Wilson* 22 Q.B.D. at page 747 says that provisions of this kind "are intended to prevent the members of local boards, which may have occasion to enter into contracts, from being exposed to temptation, or even to the semblance of temptation. *Whitely v. Barley*, 21 Q.B.D. 154 was also cited. Act No. 547 shows that the trnstees are trustees of the building for the public use and for persons resorting to the building. The trustees have made a contract with the municipality which Mr. Heather gets a benefit by and therefore he comes within the section.

His Honor said:—The question raised in this application is somewhat difficult but I do not think anything would be gained by reserving my decision. In determining this matter I can only deal with sec. 54 of the Local Government Act as I find it and that section is in the following terms:—No person holding any office or place of profit under or in the gift of the council or any municipality or concerned or participating in or of any contract with any municipality or in or of any work to be done under the authority of any such council shall be capable of being or continuing a councillor of the municipality. Provided that nothing in the preceding part of this section shall extend or apply to any contract entered into by any company partnership or association consisting of more than twenty persons, or any incorporated company where such contract is entered into for the general benefit of such company partnership or association, or to any person by reason of his being interested in any public journal publishing advertisements." This section is aimed at prohibiting councillors from being interested in contracts with the council so as to prevent the duties which they owe to the inhabitants from clashing with their own private interests. In this instance Mr. Heather is interested in a contract with the municipality, truly in a very infinitesimal degree, but still, he is interested. It is attempted to bring him within the proviso. The contract here is made by the trustees who are trustees according to the preamble of Act No. 547 on condition that the land thereby granted and the buildings for the time being thereon, should be at all times thereafter maintained and used as and for a mechanics' institute and out-offices for the instruction, use, and convenience of the inhabitants for the time being of the municipal district of Emerald Hill and other persons resorting thereto, under and in accordance with such regulations as should from time to time be made by the said persons and for no other purpose whatsoever. I think that the view Mr. Isaacs has presented is correct, viz:—that there is no such body as the trustees apart from the building and land. If I were satisfied that there was an association apart from the inhabitants I would hold that this was a contract made with an association within the terms of the proviso of sec. 54. I am inclined to think that the trustees were acting for the inhabitants. The contract is not made by the association at all, but by the trustees. It is an unfortunate case for Mr. Heather but I cannot help that. With regard to costs the relator has been guilty of great delay which has run Mr. Heather into liability for heavy penalties; on the other hand Mr Heather is in fault. I shall not depart from the usual order and shall make the rule absolute with costs.

PRACTICE COURT.

(Before Hood, J.)

Re The Premier Permanent Building Association.

27th Feb., 4th March.

Building Societies Act 1874 (*No* 493) *sec.* 33 (4)—*Companies Statute* 1864 (*No.* 190) *sec.* 74 (1), (2), (3)—*Judicature Act* 1883 (*No.* 761) *sec.* 9 (6)—*Petition to wind up a Building Society by assignee of judgment debt—Form of petition—Inability to pay debts—Costs.*

Petition by John Stewart, the assignee of a judgment debt against The Premier Permanent Building Association, for the winding up of the Association.

Mr. Higgins for the petitioner.

Mr. Isaacs and *Mr. Hayes* for the Association.

Dr. Madden and *Mr. Woinarski* for a Committee of shareholders.

Mr. Topp for a committee of depositors.

Mr. Woolf for John Macaulay, a creditor.

Mr. Weigall for the executors of J. C. Froebel, a creditor.

The facts and argument appear sufficiently from the judgment.

His Honor said, I will consider the matter.

His Honor on a subsequent day read the following judgment:—This is a petition by John Stewart, a contractor, who claims to be a creditor of the above

association, praying for a winding-up order under the provisions of the Building Societies' Act 1874. The association itself appeared and supported an order, and the shareholders and certain of the creditors also were in favor thereof; but opposition was shown by the executors of the late Johann Christian Froebel, who were suing the association for a debt due to their testator. The association is a building society, and was duly registered under the provisions of Act No. 493 on the 26th November, 1877. The petition, dated the 13th February, 1890, after setting out the objects of the society, alleges that on the 7th January, 1890, an action was commenced by Alric Oswy Hughes against the society to recover L408 4s; that judgment was obtained on the 17th January, 1890, for L413 19 4d, being the amount sued for and costs; that on the 12th February, 1890, the said judgment was by deed assigned to the petitioner; that express notice in writing of such assignment was given by the petitioner to the society; that application was made for payment on the same day without success, and that the amount is wholly unpaid and unsatisfied. Then follows a statement that the association is unable to pay its debts, and that under the circumstances hereinbefore mentioned it is just and equitable that the association should be wound up. The petition is verified by the ordinary formal affidavit. The power to wind up building societies such as the present is contained in section 33, subsection 4, of Act 493 (the Friendly Societies' Act), which provides, so far as relates to this case, that a society may terminate or be dissolved by winding-up by the Court, if the Court shall so order, on the petition of any judgment creditor. In the absence of any special rules the rules regulating the winding-up of companies under the Companies' Statute 1864 shall apply. The case has been argued by the objecting creditors solely upon the petition, which was alleged to be defective in form and substance, and their counsel put the objection in two ways:—(1) That in the petition there were no sufficient grounds alleged for winding up; and (2) that the petitioner was not a judgment creditor within the meaning of this statute. The Friendly Societies' Statute is silent as to the grounds of winding-up, but the reference to the rules under the Companies' Statute indicates an intention that the Court should be guided substantially by the principles laid down for its guidance in dealing with registered companies. The petition in this case is drawn upon that view, and the case has been so argued. The first objection taken resolved itself into two parts. It was first contended that a petition founded upon an allegation that a society was unable to pay its debts was invalid unless facts were therein set out showing upon what that allegation was based. In point of fact, it was broadly put that this petition should have stated substantially what were the assets and liabilities of this society. In support of this, reference was made to two cases—*The Catholic Publishing Company* 33 L.J. Ch. 325, and *The Buzolich Paint Company*, 10 V.L.R.,, Eq., 276. In the former case the petitioners alleged that the company was insolvent because they had not paid their debt. The company denied that it was insolvent, and disputed the petitioner's debt, and the Court adjourned the hearing of the petition till the debt had been established at law. In the latter case the petition was not based upon any inability to pay debts, but was filed by shareholders upon the ground that the company was being carried on at a loss, and that it would be just and equitable to wind it up. Mr. Justice Molesworth declined to interfere, as he thought that the shareholders should and could manage their own affairs and wind up voluntarily if they wished. Neither case, therefore, assists the objectors here, for in neither is there any question as to what should be set out in a petition founded upon an alleged inability to pay. Then this objection was put in another way. It was said that there are not sufficient facts alleged in the petition from which the Court should, in the exercise of a judicial discretion, come to the conclusion that this society is unable to pay its debts. It was argued that section 74 of the *Companies' Statute* affords a statutory definition of what is meant by the expression "unable to pay its debts." But I think that subsections 1 and 2 of section 74 only define certain particular facts, which when proved at once establish an inability to pay, and that these subsections are in no way intended to limit the generality of subsection 3 of the same section. This petition alleges a judgment against this society evidently from the dates by default, coupled with a demand for payment and non-compliance with that demand. Inasmuch as this demand was upon the 12th February, and the petition was filed on the 13th, I would have hesitated greatly in drawing any conclusion of inability to pay if there were any affidavit in opposition, or if the society itself were opposing this application, and afforded any explanation of non-payment. The society, however, does not oppose, but, on the contrary, by its counsel admits its inability to pay, and we therefore have a body which allowed a judgment to go by default for L413 in the first instance, which did not pay that judgment on demand, not only not defending but acquiescing in proceedings to wind up. No collusion or fraud is suggested, nor is there any evidence of any sort to contradict the petition, and I therefore feel no hesitation in coming to the conclusion that this association was unable to pay its debts as they became due (see *re Flagstaff Company*, L.R., 20 Eq. 268; *re Globe Company*, L.R., 20 Eq. 337); and as I think the petition is sufficient in form, I overrule the first objection. The other point taken was that the petitioner, being the assignee of a judgment creditor, is not within the meaning of section 33 subsection 4 of the *Friendly Societies' Act*, No. 493, and it was contended that that section only covers the case of a creditor who has himself obtained judgment. Several cases under the English Bankruptcy Statute were cited in support of this proposition. It is always a

dangerous thing to rely upon decisions on one statute as guides in interpreting another, and I think the cases cited when examined all turn upon the particular words of the English act. In the *Friendly Societies' Act*, the limitation as to who may petition seems to me only aimed at preventing creditors whose debts may well be open to dispute from unduly pressing one of these associations by threats of winding up. But if a judgment for over £100 has been obtained, the holder of that judgment has *primâ facie* a right to enforce payment without any proof of his debt, and I am inclined to say that a man who is a creditor by virtue of a judgment is a judgment creditor within that section, even though he be only the assignee of the original creditor. But I think that section 9 subsection 6 of the *Judicature Act*, 1883, affords an answer to this objection. That subsection provides that an assignment of a debt in manner and form as therein set out shall pass and transfer the legal right to such debt and all legal and other remedies for the same. By this new rights are given to the assignees of debts, and all legal and other remedies for the assertion of those rights (see *Goodman v. Robinson*, 18 Q B.D., 332; *Read v. Brown*, 22 Q.B.D., 128). The power to petition for a winding up is a remedy that a creditor possesses against a company that cannot pay, in order that he may get contribution from the members to the extent of their uncalled capital (*Oakes v. Turquand*, L.R., 2 E. and I. Ap., at p. 347, *re Chapelhouse Company*, 24 Ch. D., 259). That remedy, in my opinion, now passes to an assignee of the debt who brings himself within the provisions of the *Judicature Act*. I therefore also overrule this objection. There only remains the question of the objector's costs. It appears that the action which the objectors brought against the society was stayed until the decision of this matter, and it was contended that they should get their costs out of the assets of the society if I decided against them, because they were entitled to be present to hear what was the result of the petition. Even if I thought this a good reason, they did not come here to listen; they came to oppose. Again, it was said they should get their costs because these points would surely be raised sometime against the liquidation, and it was better for all parties that they should now be disposed of before any harm is done. But I cannot believe that the objectors acted with any such benevolent motives. Their purpose, as I should conjecture, in opposing this petition was either that they might get their debt paid in full at once, or that they should themselves petition, and so have the management of the winding up. Neither aspect affords any ground for giving them costs out of the assets, and I think it would be a dangerous practice to establish that a creditor who, in opposition to all other parties concerned, endeavors, for his own advantage, to prevent, on technical objections, a winding-up should be rewarded for his unsuccessful labours out of the common funds. Another creditor, Mr. John Macaulay, appeared separately, and supported the petition, but his appearance was really for the purpose of having an amendment made in the previous order staying proceedings. This was not the proper time at which to get the amendment made, but as the petitioner, by his counsel, has undertaken to amend the matters complained of, I make no special order as to this creditor's costs. I will make the winding up order as asked, with the usual direction as to costs. Order made for the winding up of the association.

SUPREME COURT SITTINGS.

(Before Webb, J.)

WILKINS v. DAVIES.

Feb. 5th, 6th.

Company—Promoters—Partners.

Promoters of a company intended to be formed are not partners.

Action by George Wilkins against William Davies to recover the sum of £77 7 5d. the amount of a judgment and costs obtained in the Supreme Court by the plaintiff against an unincorporated company entitled the Caledonian Quartz Mining Company.

The facts are as follows:—A company was being promoted to be called the Caledonian Quartz Mining Company. Three meetings only had been held by the promoters at each of which the defendant presided as chairman. At the first meeting a prospectus prepared by the defendant, was read accepted and ordered to be printed; in that prospectus the plaintiff's name appeared as acting manager He entered on his duties as manager and ordered the necessary advertising to be done through Messrs. Gordon and Gotch of Melbourne, the bills for the work done being sent to the plaintiff. Subsequently Messrs. Gordon and Gotch sued the plaintiff in the County Court for the work done by them and obtained a verdict against him, the amount of which he paid. The plaintiff, thereupon, on the 12th Sept. 1889 sued "The Caledonian Quartz Mining Company" for the amount recovered from him by Messrs. Gordon and Gotch and for other expenses. The defendant was served on the 13th Sept. 1889, the affidavit of service stating that he was served as being "a partner in the defendant company." Judgment was recovered against the said company and was removed under sec. 73 of No. 345 into the Supreme Court. The plaintiff thereupon sued the defendant upon that judgment, alleging that he was a partner in the said Company.

Anderson for the plaintiff, stated the facts; he relied on *Holmes v. Higgins*, (1 B. & C. 74) and *Lucas v Beach* (1 M. & J. 417),

Smyth (*Duffy* with him); for the defendant promoters are not partners; *Reynell v Lewis* (15 M. & W 517); *Wyld v Hopkins* (reported at same place); *Lindley on partnership*, 24.

Cur. Adv. Vult.

HIS HONOR:—

On the 4th Octr. 1889 the present plaintiffs recovered a judgment in the County Court at Melbourne

against a defendant sued as the Caledonian Quartz Mining Company. This judgment was afterwards removed into the Supreme Court and a judgment of this Court obtained on it. The plaintiff now sues the present defendant upon that judgment alleging that the defendant is a partner in the Caledonian Quartz Mining Company. It appears in evidence that the defendant and others associated themselves together for the purpose of forming a company to be called the Caledonian Quartz Mining Company. Such company was never in fact formed. The defendant and his associates occupied the position, well known to the law of promoters of such a company. But promoters are not partners although *Holmes v Higgins*, (1 B, & C, 74) and *Lucas v Beach*, (1 M. & J. 417) appear at first sight to militate against this proposition, upon examination, however, it will be found that they do not really do so. They are as pointed out by Lindley C.J., in his work on Partnership authorities that a person doing work for the joint benefit of himself and others cannot recover compensation from them by virtue of any implied promise to pay but they do not decide that such persons are partners. If it could, in any way, be held that that is the effect of these decisions, then they are inconsistent with the later case of *Reynell v Lewis* (15 M. & W. 517) and *Wyld v Hopkins* (at same place). I therefore hold that the defendant was not a partner in the Caledonian Quartz Mining Company and judgment will be entered for defendant with costs.

Solicitors, for plaintiff, *Watson*; for defendant, *Coburn*.

(Before a'Beckett J)

TANGYE v. MURPHY AND ANOTHER.

———; Feb. 11th, 26th.

Building—Adjoining land—Lateral support—Grant. A leased land with buildings thereon to B. the lease contained the usual covenant for quiet enjoyment. Subsequently A leased an adjoining piece of land (for building purposes) to C.; in this last mentioned lease C covenanted to erect certain buildings "at his own costs and expenses." Immediately prior to this action C commenced excavations near a wall of B's building which tended to deprive the said wall of lateral support. B in consequence, instituted this action claiming a declaration that he was entitled to the said lateral support; an interim injunction was obtained; this was afterwards, by consent of all parties, discontinued, C undertaking to shore up the plaintiff's wall and underpin the foundations, the question as to who should pay the cost being left for the trial of the action.

Held, on the principle that a man cannot derogate from his own grant, that both the defendants were liable to the plaintiff; but that C was primarily liable by reason of the covenant entered into by him with A and mentioned above.

Action instituted by Richard Tangye and George Tangye against John Robert Murphy and Patrick Kenney McCaughan claiming (*inter alia*) a declaration that they (the plaintiffs) are entitled to have certain land of which they are the lessees and the buildings erected thereon supported by the adjoining land of which the defendant McCaughan is lessee and the defendant Murphy lessor. The facts are as follows :— The defendant Murphy was in the year 1842 and has ever since been and still is the registered proprietor of both the above mentioned pieces of land. On 29 Dec. 1882 Murphy entered into a written agreement with the plaintiffs by which the plaintiffs agreed to erect a building upon the first mentioned piece of land and Murphy agreed when the building should have been erected to grant a lease for 25 years. By lease dated 21 Nov. 1884 Murphy leased for a term of 25 years commencing from the 1 Jan. 1883 the first mentioned piece of land to the plaintiffs. This lease contained the following covenant :—"And the lessor doth "hereby for himself his heirs etc, covenant with the "lessees that the lessees paying the said rent and per-"forming and observing all the said covenants herein-"before contained may peaceably hold and enjoy the "said premises during the said term without any in-"terruption by the lessor or any person claiming under "him." by lease dated 3 July 1889 Murphy leased to McCaughan the second mentioned piece of land for building purposes for the term of 50 years commencing from the 1st July 1889; this lease contained the following covenant by Mr. McCaughan :—"And will, "before the 1st day of July 1894, at his own costs and "charges pull down and remove the messuages, build-"ings and erections now standing and being upon the "said land, and erect and complete fit for use as stores "and offices certain buildings upon the said piece of "land in a good and substantial manner and with "good materials, and in accordance with plans, draw-"ings, elevations and specifications prepared by . . . . . etc. Immediately prior to the commencement of this action McCaughan commenced to sink excavations on his land immediately adjoining the buildings erected on the plaintiff's land to a considerable depth below the surface so as to deprive the plaintiffs' buildings of the lateral support of McCaughan's land. On the 12th Oct. 1889, the plaintiffs obtained an interim injunction restraining the defendants from excavating as above mentioned. Upon McCaughan undertaking to shore up the wall of plaintiffs building and to underpin the foundations thereof, the injunction was dissolved and it was directed (by consent of all parties) that such shoring up and underpinning should be carried out by McCaughan without prejudice to the question as to which of the parties should pay for the cost. The plaintiffs, accordingly, in addition to what has been stated at the commencement of this statement of facts, claimed a declaration that the defendants or one of them are or is liable to bear the expense of such shoring up and underpinning.

Higgins (with him *Hayes*) for plaintiffs.—Two

grounds are relied upon. Firstly—A man must not derogate from his own grant. Kerr on Injunctions 193,213; *Coote v. Gooham* (1 M. and M. 396); *Angus v. Dalton* (6 Ap. Ca. at p.p. 740, 826); *A'Beckett v. Warburton* (14 V.L.R. 308); *Roberts v. Birkley* (14 V.L.R. 819, 824.) Secondly—There is a covenant for quiet enjoyment in the plaintiff's lease.

[No evidence was given on behalf of the defendant.]

Mitchell (with him *Dr. Madden*) for defendant McCaughan cited *Bermingham v. Ross* (38 C.D. 295.)

Irvine (with him *Topp*) for defendant. Murphy referred to Woodfall's Landlord and Tenant at p.p. 643, 647 (12th Ed.); *Jenkins v. Jackson* C (40 D. 71); *Angus v. Dalton* (6 Ap. Ca 825.)

Higgins (by permission of the Court) referred to *Jenkins v. Jackson* and *Bermingham v. Ross.*

Cur. Adv. Vult.

His Honor:—On 29th December, 1882, the defendant Murphy, being the owner of certain land in Collins-street Melbourne, entered into a written agreement with the plaintiffs, by which the plaintiffs agreed to erect a building upon a portion of this land, and Murphy agreed, when the building should have been erected, to grant to the plaintiffs a lease of it for 25 years. The plaintiffs subsequently erected the building, and on 21st November, 1884, Murphy executed a lease of it to the plaintiffs for the term named. This lease recited that the plaintiffs had erected the building in accordance with plans approved by Murphy's surveyor, and contained the common covenant by the lessor for quiet enjoyment. On third July, 1889, Murphy executed a lease for the term of 50 years to the defendant McCaughan of another portion of the same land adjoining that demised to the plaintiffs. This lease contained the following covenant by McCaughan:—"And will, before the 1st day of July, 1894, at his own costs and charges, pull down and remove the messuages, buildings, and erections now standing and being upon the said land, and erect and complete fit for use as stores and offices certain buildings upon the said piece of land, in a good and substantial manner, and with good materials, and in accordance with plans, drawings, elevations, and specifications prepared by Mr. William Pitt, and signed by the lessee, such buildings to be erected and completed under the supervision and to the reasonable satisfaction in all respects of such surveyor." Shortly after the execution of this lease, McCaughan proceeded to erect a building upon the land demised to him in accordance with plans prepared by Pitt. In excavating for the foundations of this building the adjoining wall of the plaintiffs' building became endangered, and the plaintiffs brought this action against both Murphy and McCaughan, claiming an injunction to restrain the defendants from excavating so as to render the plaintiffs' premises liable to damage in consequence of the removal of their lateral support, and also claiming damages for the injury sustained by the plaintiffs. By consent an order has been made in this action by which the defendant McCaughan undertaking to properly shore up and underpin the plaintiffs' wall it is ordered that an *exparte* injunction already obtained be discontinued, and that the shoring-up and underpinning be done by McCaughan without prejudice to the question as to which of the parties to the action is liable to bear the expense of such work. This shoring-up and underpinning has since been done to the plaintiffs' satisfaction by McCaughan at an expense of £1079. The action now comes before me for trial the only questions being which of the parties is to bear the expense of the shoring-up and underpinning, and as to costs. I take it now to be well-settled law that if an owner of land demise one part of it with a building upon it as to which no prescriptive right has arisen, to A, and subsequently demise an adjoining part to B, B cannot legally deprive A's building of the lateral support of the adjoining soil. In *Palmer v. Fletcher*, (1 Lev., 122) it was held that where a man erected a house on his own land, and afterwards sold the house to one and the adjoining land to another, the latter could not obstruct the lights of the house, although they were not ancient lights. That decision was based upon the principle that a man cannot derogate from his own grant, and it was there decided that that principle extended to any person claiming by purchase from the grantor That case proceeded upon the ground that "the lights were a necessary and essential part of the house," and certainly one of the walls of the house and the support of such wall are equally a necessary and essential part of the house. *Robinson v. Grave*, 21 W.R. 233, 569, was also a case of light. There a man contracted to purchase a piece of land, and erected buildings on it. He then took a conveyance from the vendor in which the parcels were "all that piece or parcel of land which has been lately built upon by the said R. K." the purchaser) containing &c. "together with all new erections now standing and being upon the said piece or parcel of land." Afterwards the vendor sold and conveyed the land adjoining to the defendant Grave and both Wickens V.C. and the Lords Justices, affirming him, held that neither the original vendor nor Grave his assignee, had any right to obstruct the passage of light through the windows of the newly-erected buildings. In the celebrated case of *Dalton v. Angus*, (3 Q. B. D. 854 Ib. 162, 6 App. Cases 740), which ultimately went up to the House of Lords, the point actually decided was that a right to lateral support to a building may be acquired by 20 years' uninterrupted enjoyment. But the whole question of a lateral support was there very fully gone into, both by the learned judges who were called upon to advise the House and by the noble and learned Lords who delivered judgment in the case; and Lord Blackburn at page 826 says:—"I think it is now established law that one who conveys a house does by implication, and without express words, grant to the vendee all that is necessary and essential for the enjoyment of the house, and that neither he nor any who claim under him can derogate from his grant by using his land so as to injure what is necessary and

essential to the house. And I think that the right of support from the adjoining soil is necessary and essential for the enjoyment of the house." *Roberts v. Birkley* (14 V.L.R. 829), in this court, was a case as to lights, and was decided by my brother Holroyd upon the same principle, that a man cannot derogate from his own grant. There the defendant, a lessee of land, sublet part of the land with a building on it to the plaintiffs and afterwards sublet other part of the land to one Denton, who covenanted with the defendant to build a shop on it to her approval and satisfaction. In building this shop Denton obstructed the light to the windows of the plaintiffs' building. For this obstruction the plaintiffs sued their immediate lessor in trespass, and it was held that she was liable for the acts of her sub-lessee. *Rigby v. Bennett* (21 Ch. D. 559) is a case very similar to the present. There the corporation of Liverpool contracted to lease land to the plaintiff, subject to a condition that he should erect thereon buildings, to the satisfaction of the corporation. The plaintiff then proceeded to build upon the land in accordance with plans approved by the corporation. Whilst these buildings were in progress the defendant contracted for a lease of adjoining land from the corporation. When the plaintiff's buildings were nearly finished the corporation granted him a lease of the land on which they stood and subsequently granted a lease of the adjoining land to the defendant. The defendant afterwards commenced building on his land, and excavated to a greater depth than the plaintiff's foundations, and endangered them. The plaintiff thereupon commenced his action, claiming, as here, a declaration that he was entitled to such lateral support from the defendant's land as might be necessary for the support of the plaintiff's land and building, and an injunction. There, also, as here, an interim order was made by consent that the defendant should underpin the plaintiff's wall without prejudice to the question of who was liable for the expense. Bristowe, V.C., of the Duchy of Lancaster, before whom the action was tried, held the plaintiff entitled to the support he claimed, and the defendant liable for the costs of the underpinning, On appeal his judgment was upheld by Jessell, M.R., and Cotton and Brett, L.L.J. Jessell, M.R., saying—"If the corporation granted the house to the plaintiff as it then stood, or granted the land on which the house was standing, they granted with it, if I may say so, the easement or the implied obligation or warranty that the house should not be let down by anything done on their adjoining land." That case is also a clear authority against the proposition for which the defendants contend here that the plaintiffs knew, or from the circumstances of the case must be taken to have had notice, that the lessor, Murphy, was going to use the adjoining land for building upon, and that, therefore, this case forms an exception to the general rule that a grantor cannot derogate from his own grant. That contention was dissented from there because it was said, such a right of support [as the plaintiffs claimed] would not prevent the lessor from building with reasonable convenience on the adjoining land. Here the plaintiffs' foundations extend to a depth of about 13ft. below the surface and it is impossible to say that knowledge or notice of an intention to build on the adjoining land was knowledge or notice that such building could not be erected with reasonable convenience without endangering the plaintiff's building. Following the authority of this long line of cases, with the principle of which I entirely agree, I hold that the plaintiff is entitled as against both defendants to the relief which he seeks. As between the defendants themselves the defendant M'Caughan is primarily liable. It has been argued for him that he was bound by his covenant with the defendant Murphy to erect the buildings as approved by Murphy's architect, and that the buildings could not be erected according to the plans approved without endangering the plaintiff's wall. But the very covenant referred to is to erect these buildings "at his (M'Caughan's) own costs and charges," and, if the buildings agreed on between them could not be erected without the necessity of shoring-up and under-pinning the plaintiff's wall, then the cost of that is a necessary part of the costs and charges of erecting the building. Declare that the plaintiffs are entitled to have the plaintiffs' demised premises and the buildings now erected thereon supported by the defendant M'Caughan's demised lands. Declare that the defendants are, as between them and the plaintiffs, liable to bear the expense of shoring-up and underpinning the western wall of the plaintiffs' said buildings, but that, as between themselves the defendant M'Caughan is liable to bear such expense. Order the defendants to pay the plaintiffs their costs of this action. Refer to tax. Let the defendants each abide his own costs.

Solicitors for plaintiffs *Taylor, Buckland and Gates*; for defendant *Murphy, Lynch McDonald Stillman* and *Keep*; for defendant *McCaughan, Attenborough Nunn* and *Smith.*

SITTINGS IN BANCO.

(Before Higinbotham, C. J., Holroyd, and Hood J. J.)

MacNamara v. Cameron.

4th March, 1890.

Practice—Order 36 *rule* 3—*Power of judge in chambers to vary his own order.*

This was an appeal by the plaintiff from an order made by Williams, J., (sitting for Holroyd J.) rescinding an order by Holroyd, J., made *exparte* for the trial of the action by a jury, and directing that it should be tried by a judge without a jury.

The action was brought by Mr. Henry M'Namara, of Bundoora, against Mr. Alexander Cameron, of Melbourne, to set aside the purchase of the plaintiff's

land by the defendant at a sheriff's sale, and to obtain a declaration that the defendant was a trustee of the land for the plaintiff, and that the defendant should be ordered to transfer the land to the plaintiff on payment of the amount of the judgment on which the land was sold. It appeared that about February, 1888, the plaintiff sought to obtain a loan on the security of the land, which was already mortgaged, and he employed a Mr. E. D. Finnegan for the purpose. Some difficulty arose in the negotiations, and Finnegan sued M'Namara in the County Court for his commission, and obtained a judgment against him for £32. The land was sold under a writ of *fi. fa.*, issued on this judgment, and Mr. Cameron purchased the property from the sheriff, subject to the mortgages, for the sum of £56 10s. M'Namara alleged that Cameron purchased the land under an arrangement with Finnegan, so as to obtain a better security for the amount of his judgment, but the defendant denied this. In September last M'Namara applied *exparte*, and obtained an order from Mr. Justice Holroyd for the trial of the action by a jury. The defendant subsequently applied to Mr. Justice Williams on summons and obtained from him an order setting aside the previous order for trial by a jury, as it was a case falling within the equitable jurisdiction of the Court, and therefore one that ought to be tried without a jury. From this order the plaintiff appealed.

Isaacs for the appellant. The order for trial by jury was obtained *exparte* under Order 36 rule 6. That is the regular practice: see *Green v. Embling*, 6 A.L.T. 98; *Coulson v. Campbell*, 6 A.L.T. 89; *Prattle v. Slater*, 6 A.L.T. 70 and *Butters v. Durham Gold Mining Company Co.*, 11 V.L.R. 375.

This order must be considered as having been discharged by the judge who made it. A judge when no new facts are brought before him has no power to vary his own order. If the original order was wrong the only remedy was by appeal: *Judicature Act*, 1883, section 28.

Hayes for the respondent. This *exparte* order must be considered as obtained under order 36 rule 3. The regular practice is by summons *Cardinall v. Cardinall* 25 Ch. D. 772. The order was obtained behind the defendant's back and he has a right to come before the judge who made it to have it discharged. A judge has general control over interlocutory orders and has power to correct any irregularity or remedy any abuse of the process of the court. He cited *Bidder v Bridges* 26 Ch. D. 1; *Mullins v Howell* 11 Ch. D. 763; *Guest v. Goldsborough* 7 A.L.T 18 *and Chitty's Practice* 14th Ed. 1415.

HIGINBOTHAM, C.J.—On the 27th September 1889, an order was made by Mr. Justice Holroyd, on the application of the plaintiff, for the trial of this case by a jury. The application was made *exparte*, and it was granted. A summons was afterwards taken out by the defendant, which was heard by Mr. Justice Williams on the 10th October, calling on the plaintiff to show cause why that order should not be set aside. An order was made setting aside the order for trial by jury. Against this latter order the present appeal is made. For the purpose of dealing with this appeal, it must be deemed for all purposes that Mr. Justice Williams was acting in the place of the judge who made the original order. We think that in cases of this kind where a party comes before the judge to deal with a question as to whether a proceeding *exparte* in character should not be set aside, he has the same right to rely upon the grounds, and urge the arguments which he would have been entitled to rely on or to urge if the original proceedings had been by summons, and not *exparte*. In this case, therefore, the defendant has the same right to object upon any ground to the trial of this case by a jury as he would have had if the original proceeding had been by summons and not by an *exparte* application. We have no certain knowledge of the ground on which Mr. Justice Williams acted in rescinding the previous order on the 27th September. But we are justified in the absence of knowledge on that subject in assuming that the learned judge believed that this was a case which would have heretofore come before the Court in its equitable jurisdiction and relying on rule 3, of order 36, he believed he had, jurisdiction to set aside the original order, as this not a case which should, as of right, be tried before a jury, and in the exercise of the discretion given by that rule, he rescinded the order which was made by Mr. Justice Holroyd on the 27th September. Upon that ground, and without consideri g or being called on to consider either the regularity or the irregularity of the original proceeding, or the cases in which a judge undoubtedly still retains the power to review and modify his previous decision, consistently with section 28 of the Judicature Act, we think this appeal must fail. The appeal will be dismissed with costs.

HOLROYD, J.—It was at my request that Mr. Justice Williams heard the summons to set aside the order made by me *exparte*, and it must be treated as if I had heard the summons myself. When an order is made *exparte* which affects the rights or interests of any person, that person is entitled to move to set aside the order or to vary it. In the first instance I exercised the discretion under rule 3 of order 36, and that discretion I should have been entitled to exercise again when argument was brought before me to induce me to think that I had exercised it wrongly in the first instance.

Appeal dismissed with costs.

Solicitors: For appellant, *Backhouse;* for respondent, *Herald.*

IN CHAMBERS.

(Before Hodges, J.)

FRANKLIN v. FRANKLIN.

6th March.

Rules of Supreme Court 1884 *Order XX r* 1 (*a*)—*Specially indorsed writ—Delivery of Statement of Claim—Where the plaintiff commenced an action as executrix on a specially indorsed writ, and after the commencement thereof she discovered other causes of*

action against the defendant which were not the subject of special indorsement, she was allowed to deliver a statement of claim incorporating all the causes of action against the defendant

Application on behalf of the plaintiff for leave to deliver a statement of claim.

Mr. Neighbour in support.—The action has been commenced by the plaintiff as executrix by a specially indorsed writ on an overdue promissory note. The defendant has delivered a defence and counterclaim since the delivery of which the plaintiff has discovered a number of claims which the estate had against the defendant and she wishes to bring these claims before the court and have them adjudicated upon along with the claim on the promissory note.

Mr. Cussen to oppose.— The writ is specially indorsed. It is provided by Order XX r. 1 (a.) that where the writ is specially indorsed no further statement of claim shall be delivered; the plaintiff cannot therefore deliver a statement of claim in this action.

His Honor—Order XX. r. 1 (a.) is to prevent the unnecessary piling up of costs. I cannot see why I should make the plaintiff go on with this action in its present form and commence another action and then apply to have the two actions consolidated. I think it is only a question of costs. I allow the summons the plaintiff to pay to the defendant the costs of this application, which I fix at £3 3s. and also the costs occasioned by the amendment. I certify for counsel.

Solicitors for plaintiff, *McCutcheon & Bruce*; for defendant, *Hughes & Permezel.*

(Before Hodges, J.)

PRICE v SANTLEY.

11th March.

Common Law Procedure Statute 1865 (*No.* 274) *sec.* 332—*Ca Re—The mere fact of a defendant who is domiciled here being about to depart from the colony upon a voyage in the usual course of his business will not justify his arrest under a Ca Re, but where a defendant is not domiciled in the colony he does not bring himself within this rule.*

Application on behalf of the defendant for an order that the Ca Re be set aside on the grounds that material facts were withheld for the Judge on the application for the same, and that he was not leaving the colony permanently, or in the alternative that the bail be reduced. The Ca Re was granted on the statement *inter alia* that the defendant was about to leave the colony for New Zealand. The defendant made an affidavit in support of the present application in which he alleged that he was a professional singer and, at the time of the granting of Ca Re was going to New Zealand merely to fulfil a professional engagement and that he intended to return to Melbourne in the month of April.

Mr. Leon in support.

Mr. Isaacs to oppose.

His Honor after deciding against the ground of withholding of facts further said:—It appears that the defendant is not a resident of the colony but is merely on a professional visit to the colony to fulfil certain musical engagements in the colonies. He swears that he intends to come back to Melbourne in April next but that intention would be complied with if he came into the bay in a mail steamer and left again by her. In *Ivey v. Cavanagh* 4 V.L.R. (4) 274 this matter was discussed and it was there held that the mere fact of a defendant being about to depart upon a voyage in the usual course of his business will not justify his arrest under a Ca *Re.* In that case the defendant was in the habit of making voyages in pursuit of his business and he was a resident in this colony; in the present case however the defendant's business does not bring him within the rule laid down in *Ivey v. Cavanagh* because he has no domicile in the colony. His Honor further said that on the facts stated he saw no reason for reducing the bail and dismissed the summons with L3 3s. costs and certified for counsel.

Solicitors for plaintiff, *Blake & Riggall*; for defendant, *Eggleston, Derham* and *Martin.*

DE MESQUITA v. SAUNDERS.

12th March.

Rules of Supreme Court 1884 *Order XXVII—r.* 11—*Motions for judgment under order XXVII r.* 11 *and analogous motions can be listed for hearing on the days set apart for hearing probate applications so long as Mr. Justice Hodges hears such applications.*

Application on behalf of the plaintiff calling upon the defendant to show cause why the plaintiff should not be at liberty to sign final judgment in the action on the certificate of the chief clerk for £1,000 with costs to be taxed.

This was an action for the taking of partnership accounts. Appearance was entered and then application was made to refer the matter to the Chief Clerk. Both parties appeared on the taking of accounts and the chief clerk certified that £1,000 was owing by the defendant to the plaintiff.

Mr. Hayes in support.

Mr. Leon to oppose.

His Honor said:—In *Riddell v. McWhinnie* 11 A.L.T. 126, Mr. Justice Hood intimated that he had instructed the Prothonotary to set down motions of this nature in a list which he would adjudicate upon on Thursdays so long as he was taking Probate business. I shall follow that practice so long as I am undertaking the same duties.

Solicitors, for plaintiff, *Sievwright*; for defendant, *Kane.*

(Before Hood, J.)

CLIFFORD v. MOORE.

13th March.

Rules of Supreme Court 1884 *Order XXV r.* 4—*Where the defence to a contract is that the defendant*

acted as agent only, the defence should show not only that the plaintiff knew that the defendant was acting merely as agent but also that the plaintiff never intended to contract with the defendant as principal.

Application under Order XXV. r. 4 on behalf of the plaintiff calling upon the defendant to show cause why the defence should not be struck out or amended on the ground that the same discloses no reasonable answer.

The action was brought to recover principal and interest alleged to be due by the defendant to the plaintiff under a certain agreement made between them for the selling of certain land.

The defence was as follows :—

The defendant says that when he signed the agreement referred to in the Statement of Claim he was acting only as agent for one D. Munro as the plaintiff well knew.

Mr. Neighbour in support. The defence delivered is no answer to the claim. It should have gone on to allege that it was agreed between the parties that the defendant should not be treated as a principal. He cited *Higgins v. Senior* 8 M. & W. 834 ; *Chitty on Contracts* 11th Ed. : pg. 210 and *Fry on Specific Performance* pg. 107.

Mr. Johnston. It was held that this was a good equitable defence in *Wake v. Harrop*, 30 L.J., [Ex.] 273 ; affirmed at 31 L.J. [Ex.] 451. If the plaintiff knew that the defendant was acting only as agent equity will not allow the plaintiff to succeed. If the parties intended that the principal only should be bound it is the same as if the parties had agreed that the agent was not to be bound.

Mr. Neighbour in reply. In the case of *Wade v. Harrop* it appears that there was a distinct agreement that the agent should not be bound ; in the present case there is no such agreement alleged.

His Honor. I think the defence in this case shows no answer to the action. To bring it within the authority relied upon by the defendant it ought to show not only that the plaintiff knew that the defendant was acting as agent but that the plaintiff never intended to contract with the defendant as principal. I give the defendant leave to amend within 4 days, if the defendant do not do so within the time allowed the defence to be struck out.

Solicitors, for plaintiff, *Madden & Drake* ; for defendant, *Blake & Riggall.*

(Before Hodges, J.)

Hopkins v. Kelly.

14th March.

Common Law Procedure Statute 1865 (*No.* 274) *sec.* 180—*Sec.* 180 *of Act No.* 274 *ought to be brought into operation only when it appears that there is no dispute about the tenancy.*

Application on behalf of the defendant that the proceedings in this action be stayed until the hearing of an action brought by the defendant against the plaintiff.

Dr. Madden in support. There are two actions between these parties; in the first the defendant in this action claims the specific performance of an agreement by the present plaintiff to grant her a renewal of a lease for a hotel leased by the defendant from the plaintiff. The present action is one in ejectment brought by the plaintiff to recover possession of the same premises. If in the first action the present defendant were to succeed the plaintiff in the present action must fail. It is therefore contended that the present action should be stayed until the determination of the other one.

Mr. Higgins to oppose. There would be no objection in an ordinary case to the proposed order being made, but in the present case the plaintiff wishes to take proceedings under sec. 180 of the Common Law Procedure Statute 1865 to hold the defendant to bail.

His Honor said. I think sec. 180 ought to be brought into operation only when it appears that there is no defence to the action. I do not remember an application to have ever been made under that section while I was at the bar. [His Honor read the section.] This section contemplates a case where there is no dispute about the tenancy. I allow the application.

Solicitors: For plaintiff, *Davies, Campbell and Davies ;* for defendant, *Davies, Price and Wighton.*

(Before Hodges, J.)

Reg. v. Lawrence.

18th, 19th March.

Criminal Law—Money found on prisoner at the time of his arrest—application to hand over same to prisoner for the purposes of his defence—Where, in an application to hand money found on a prisoner at the time of his arrest for the purposes of his defence, the court has reasonable grounds for supposing that the money is the proceeds of the property stolen it will not make the order.

Application on behalf of a prisoner for an order on the police to hand over to the prisoner's solicitor certain monies found upon his person at the time of his arrest to enable him to fee counsel and pay the solicitor the expenses of getting up the defence.

Mr. Kane in support. The prisoner is charged with embezzling a large sum of money from Mr. Lyons his employer. On his arrest money was found on him which is not capable of identification and is not wanted as evidence by the police. The prisoner wishes for a certain portion of that money for the conduct of his defence. Two orders of a similar nature were made at the instance of the captain and chief officer of "The Ferret," and are reported in the *Argus* of the 13th and 17th June 1881 respectively.

The Crown Solicitor for the police offered no objection to a portion of the money being handed over as it was not necessary for the conviction of the prisoner.

His Honor said. I will consider the matter.

His Honor on the next day said. In this case an

application was made to me to order the police to hand over to the prisoner's solicitor certain monies found upon his person in order to enable him to fee counsel and pay his solicitor the expenses of getting up the defence. The right to obtain such an order appears to be founded on this ground; if the Court has reasonable grounds for supposing that the money is the proceeds of the property stolen it will not make the order, but if the Court has no reasonable grounds for so supposing it will make the order. In this case the Crown have made no affidavit and have given me no means of forming an opinion as to whether the money found upon the prisoner is the proceeds of this crime. Under these circumstances I shall make an order and I shall direct that £30 be handed over to the prisoner's solicitor for the purposes of the defence. The authority I have acted upon is *Rex v. Burgess*, 7 C. and P. 488.

PRACTICE COURT.

(Before Hood, J.)

PHILLIPS v. MELBOURNE AND CASTLEMAINE SOAP AND CANDLE COMPANY LIMITED.

5th, 13th March.

Company—Balance sheet—Dividend—Paying a dividend out of capital a shareholder can maintain an action in his own name, without having first endeavoured to obtain the assistance of the company by means of a majority of shareholders where the Act complained of is illegal or fraudulent, or one that the majority of the shareholders could not confirm or ratify—so long as a company pays its creditors there is no reason why, in an apparently flourishing concern, it should not go on and divide profits though every shilling of the capital may be lost—meaning of "capital."

Motion on behalf of the plaintiff for an order that the defendants and each and every of them be restrained and an injunction be granted restraining them and each and every of them from applying any part of the assets of the Company which represented capital or which ought to be retained to represent capital, in the payments of the dividends on the shares in the company until after the trial of the action or until further order.

Mr. Isaacs in support.

Dr. Madden to oppose.

The facts and arguments appear sufficiently from the judgment.

HIS HONOR said. I will consider the matter.

HIS HONOR on a subsequent day read the following judgment:—The plaintiff in this action has applied on notice of motion for an order that the defendants be restrained and an injunction granted until the trial, or until further order, to prevent the defendants or any of them from applying any part of the assets of the company which represented capital, or which ought to be retained to represent capital, in payment of dividends. The plaintiff is the holder of 500 shares in the defendant company, and the other defendants are the directors. About the 7th February last the directors issued a notice calling a meeting of shareholders for Monday, 17th February, for various purposes, and with that notice was published the fourth half-yearly balance-sheet of the company. It appears that at the meeting a resolution was passed adopting the report and balance sheet, and affirming that a dividend of £10 per cent. per annum be declared. Against this the plaintiff protested, both verbally and by letter. The directors disregarded his protest, and thereupon the plaintiff issued his writ, and made this application. On the hearing of this motion, an objection was taken by Dr. Madden, on behalf of the defendants, that the plaintiff could not maintain this action in his own name without having first endeavoured to obtain the assistance of the company by means of a majority of shareholders, and in support counsel relied upon *Hardy v. Wilson* (8 V.L.R., Eq. 289), and cases there cited. The rule there laid down, however, does not apply where the act complained of is illegal or fraudulent, or one that the majority of shareholders could not confirm or ratify (*Lee v. Robertson*, 1 W. and W., E. 374, Lindley, 5th ed., 578, 579), such as the payment of dividends out of capital (*Leeds Company v. Shepherd* 36 Ch. D. at p. 800). I decide this point against the defendants, and have therefore to consider the question really in controversy. The protest made by the plaintiff, and the arguments of his counsel, Mr. Isaacs, in support of this motion were based upon the balance-sheet issued by the directors, and there is little or no dispute about the facts, but only as to the inferences properly deducible from that balance-sheet. According to the profit and loss account the company appears to have earned £693 17s. 1d. during the half-year, at an expenditure of £411 17s. 3d., leaving a balance of £281 19s. 10d. which is the amount out of which the directors propose to pay the dividend. But it appears also from the balance-sheet that in estimating the assets and liabilities of the company some very unusual items are included as assets. Those items are—Law charges, £74 18s. 10d.; forfeited shares, £200; and flood account losses, £1,367 3s. 5d. It is contended on behalf of the plaintiff that all these should be excluded from consideration, and that it then appear that this company has made no profits, but is practically insolvent, and that this dividend must necessarily be paid out of capital and not out of profits. Such a payment would be illegal, even apart from article 67 of this company's articles, and if the plaintiff can successfully show that the capital is to be so used he is entitled to an injunction (See Lindley, 5th ed., 321, note S., and cases there cited). As to the first of these items, the defendants have explained that it represents the amount paid to the company's solicitors for completing title to the freehold property, and would therefore, in the ordinary course, have been included under the head of property account, but was kept separate in order to show the money actually paid for this purpose. The counting of the forfeited shares as assets has been justified by the fact that the whole of the shares

are included as liabilities on the one side, and that therefore these, which are practically unissued, should be reckoned on the other. The flood losses, I understood Dr. Madden to admit, ought not to have been placed as assets except so far as they were to be set off against some of the shares in some manner which has not been made clear. If, however these items were eliminated from the assets, the company would not, in my opinion, be insolvent. There would still be ample assets, for the payment of all liabilities to creditors, apart from the shareholders themselves, and the company has ample funds for paying all its debts as they become due. So long as a company pays its creditors there is no reason why, in an apparently flourishing concern, it should not go on and divide profits though every shilling of the capital may be lost (*Lee* v. *Neuchatel Coy.*, 4 1 Ch. D. at p.p. 22, 23, per Lindley L. J.) and it is only a matter of prudence and not of law whether or not dividends shall be paid when assets are of less value than the original capital (*ibid.*) This view, therefore, does not, I think, determine whether or not this dividend is payable out of capital. As used in connection with a company, "capital" generally means the money obtained or to be obtained for the purpose of commencing or extending the business, as distinguished from the money earned in carrying on the business. It would also, I think, include such portions of the earnings as had been used in extending the business or in replacing lost capital, instead of being spent or divided (Lindley 391). But the meaning of the word has never been extended to include ordinary receipts. The proper fund for the payment of dividends is the excess of the company's earnings over the expenses incurred in obtaining them. Such excess constitutes the profits out of which dividends may be paid (see per Blackburn, L. J. 6 Ap. C., at p. 329). And if a company, after defraying all current expenses and the interests of its debts, has a surplus arising from its current receipts, there is no principal, either of law or morality, which requires that such surplus shall be accumulated, or forbids its division as profits amongst the shareholders. Whether the whole or any part of the surplus of receipts over expenditure shall be accumulated or divided is a question which it is competent for the majority of the shareholders to decide (*Stevens v. South Devon Railway*, 9 Ha., 313; *Coery v. Londonderry Company* 29, Beav. 263; *Brown v. Monmouthshire Company*, 13 Beav. 32, Lindley 430). According to the present balance sheet there is to the credit of profit and loss a sum of L281 19s. 10d., and where directors make out a profit and loss account the Court ought to assume very strongly indeed that it is a correct account. Nor ought it to be set aside, or a dividend made upon it declared improper, without very strong reasons. (Rance's case. L.R., 6 ch. Ap., at p. 122, per Mellish, L.J.) The omission of the disputed items from the list of assets would apparently destroy the balance shown to be in hand, but I consider this more a matter of accounts than of principle. No imputation of fraud or dishonesty has been made. The directors assert that out of the excess of income over expenditure they have this money, and are about to pay the dividend out of it, and I can see no reason for doubting that statement. The plaintiff's real complaint, in my opinion, is not that the directors are paying dividends out of capital, but rather that they will not allow profits to accumulate in order to replace lost capital, which is clearly a matter for the company itself to decide. A further objection was taken by Mr. Isaacs, that in any event the amount at the disposal of the directors was not sufficient to pay the proposed dividend. Even if there were any force in this view, it is completely answered by the supplementary affidavit which I allowed defendants to file. For these reasons I refuse this application, but, considering the form of the balance sheet, I make costs costs in the cause.

Solicitors for plaintiffs *Farmer & Roberts*; for defendants *F. K. Best.*

SITTINGS IN BANCO.

(Before Holroyd Kerferd and a'Beckett J.J.)

Attorney General v. Goldsbrough.

Oct. 29th 1889.

Land Act 1884 *s.* 15—*effect of this section to cure the illegality of any previous Crown grant—where a Crown grant of land has been issued subject to a condition that the Crown may resume possession at any time on a refund of the purchase money together with interest and compensation the Governor in Council has no power without receiving any valuable consideration and a manner not provided in the Land Acts to extinguish the power of resumption and issue a fresh grant free from this condition—Such a grant is illegal but if issued before the coming into operation of the Land Act* 1884 *the illegality is cured by sec.* 15 *of that Act.*

Appeal from a judgment of the Chief Justice.

This suit was tried before the Chief Justice, and judgment given for the defendants R. Goldsbrough and Co. and William Williams. The latter leased 3 acres of land between the Spencer street railway station and the site of the new docks, for the purposes of a railway carriage factory, in 1863. The land was put up for sale by public auction in 1867, and purchased by Williams for L300. A Crown grant was issued to him, with a condition that the Crown might resume possession at any time on paying back the amount of the purchase money, together with a valuation for improvements. On the 10th April 1872 he obtained through the then Minister of Lands, Mr. J. M. Grant, a second grant, free of any condition. In 1878, the Crown having seen reason to question the second grant, lodged a caveat against any dealing with the land by Williams, but in February 1888 he sold to R. Goldsbrough and Co. for L25,000. The Attorney General then began an action to test the validity of the second grant. This was done at the suggestion of the Full Court, to whom Goldsbrough had made an

application for the removal of the caveat. The Chief Justice had heard the case, and having decided against the Crown, an appeal was made to the Full Court.

Box with him *Hood* for Attorney-General.—There cannot be gifts of the Crown lands of the colony. The grant of 10th April 1872 to Williams is illegal and unauthorised. The land was sold under sec. 3 of Land Act 1862 and sec. 32 of Land Act 1865. The Governor in Council is authorised by these Acts to deal with such lands only in certain ways. It is unnecessary to allege fraud, because the second grant was a nullity. Only three ways in which land can be alienated from the Crown :—1. By license or lease (selection). 2. Sale by public auction. 3. Lease or license for other than agricultural purposes. The dealing with the land being illegal, the Crown can impeach the grant at any time.

The grant impeached in this case is merely a statutory assurance. *Reg. v. Hughes*, L.R. 1 P.C. 81.

The invalidity of the grant not cured by sec 15 of Act of 1884, nor does registration of the grant under the Transfer of Land Statute necessarily make it valid because it was invalid from the outset.

Sec. 15 of the Act of 1884, provides for irregular instruments but does not cure illegality—secs. 66, 80, 90, of Act of 1884, prevent alienation in fee simple the lands therein described and this land comes under one of these descriptions. This grant should be delivered up to be cancelled.

Madden with him *Topp & Higgins* for the defendant Goldsbrough. An outstanding interest in the Crown such as this cannot prevail, unless there is fraud. The grant is good. The crown cannot derogate from its own grant as against a third party. The Crown and the defendant (Williams) dealt honestly and the grant cannot be set aside. The Court below found that the grant was registered under the *Transfer of Land Statute*, and the plaintiff admits it to be a Crown Grant. Sec. 15 of Act of 1884 applies in this case and cures any irregularity—the object of that section is to provide for such irregular grants as this and to make them valid. The words of the sec—"every grant" are general. "Any instrument . . . purporting to be a grant shall . . . be valid, etc." This instrument purports to be a grant on its face and comes within the Section.

Purves, Q.C., Mitchell and Cumbrae Stewart, for defendant Williams.

C.A.V. 1st March 1890.

Holroyd, J., read the following judgment of the Court: Our decision in this case turns upon a single point which is unaffected by several of the other questions dealt with in the judgment under appeal, on which we express no opinion. We think that the grant sought to be set aside in this action was illegally issued, but that section 15 of the *Land Act*, 1884, validating any grants theretofore issued, extended to the grant in question, and, therefore, that this court cannot set it aside. As we differ from the learned Chief Justice in holding the grant to have been illegal we shall shortly state our reasons for so thinking. The grant was made for the purpose of giving effect to a sale by auction held in March, 1866, at which Mr. Williams, was declared the purchaser, at the price of L300. That sale was made under an act which authorised sales, subject to such conditions as the Governor in Council might direct, and the important condition affecting this sale was that her Majesty might at any time resume possession on payment to the purchaser of his purchase money, with interest at the rate of 10 per cent., and with compensation for improvements, to be fixed by arbitration if not agreed upon. At this sale, affected by this condition, which appears to have excluded competition, Mr. Williams bought 3 acres in the city of Melbourne at the upset price of L100 an acre, and afterwards complained that the sale was not in accordance with prior promises made to him by the Minister of Lands, on the faith of which he had surrendered a lease of the land, and he stated his willingness to take his purchase money back and have the sale annulled. He, however, received a Crown grant, containing the obnoxious condition. The Minister of Lands, thinking that Mr. Williams' complaint was just, desired to afford a remedy, and the remedy which he adopted was an extraordinary one. Instead of annulling the sale and putting up the land for resale free from the condition which Mr. Williams protested against, Mr. Williams was allowed to surrender the grant, but to retain his position as purchaser and to receive a new grant free from the conditions. The transaction was nominally that of the Governor in Council, and must be regarded as such in determining its validity, but it was none the less invalid. Whether the issue of the new grant free from the condition is to be considered as the extinguishment of a power of resumption by the Crown, or the substitution of a grant not in conformity with the conditions under which a sale was made for a grant previously issued in conformity with such conditions, it was equally illegal. The Crown received no valuable consideration for the surrender of the power of resumption, or for the new grant; and by virtue of this grant, contrary to the Land Acts declaring that the Governor in Council should dispose of Crown lands as thereby provided and not otherwise, this land was disposed of for the benefit of Mr. Williams. The illegality which we recognise is independent of the technical objection, that there was no valid surrender of the first grant, and that two grants of the same land could not co exist. We regard the substantial and obvious result of the transaction. By means of a sale, nominally by auction, but made under a condition excluding competition, Mr. Williams was allowed to buy valuable land at its upset price. This condition was afterwards, at his request, and for his advantage, annulled, and he was treated as having purchased free from such condition. The facts speak for themselves, and show the inutility of providing that Crown land shall only be disposed of in accordance with acts of Parliament, if sales purporting to be held under such acts can be effected in this manner. We have next to consider the enactment which in our view, and in that of the Chief Justice, precludes the plaintiff from obtaining redress. The 10th section of the Land

Act 1862, was as follows :—

When her Majesty has become, or may hereafter become, entitled to any lands, either by escheat for want of heirs, or by reason of any forfeiture, or by reason that the same had been purchased by or for the use of or in trust for an alien or aliens, if the Governor in Council thinks fit so to do, the Governor may grant such lands or any part thereof in fee simple, or for any less estate, to any person for the purpose of restoring the same to any of the family of the person whose estate the same had been, or of carrying into effect any intended grant, conveyance, or devise of such last mentioned person in relation thereto, or of rewarding any person making discovery of such escheat, or of her Majesty's right and title thereto; and every such grant heretofore made shall, anything in any act to the contrary notwithstanding, be valid and effectual as well against her Majesty as against all other persons.

The last clause, commencing 'every such grant,' indicates plainly that the grants intended to be validated were grants of the same description as those mentioned in the previous part of the section. In *The Land Act*, 1869, which repealed the Act of 1862, the 10th section of the earlier Act reappears with a slight, but very important alteration, and divided into two sections, 10 and 11. All the first part of it was re-enacted in the same terms by the 10th section of the latter Act, but the last clause, which was separated into section 11, thus :—

Every grant or instrument heretofore executed by the Governor on behalf of Her Majesty, and purporting to be a grant, shall, subject to the conditions thereof, be valid and effectual, as well against her Majesty as against all other persons, any law to the contrary notwithstanding.

The omission of the word 'such' before the word 'grant' in this 11th section, making its language pointedly general, and the separation of its validating provisions from those which used to precede it, empowering the Government to make grants of certain lands for certain purposes, preclude us from regarding it as confined to any particular form of illegality. The validating enactment appears here to be as plainly general as it was formerly restricted. All sales under the Land Acts were statutory sales, and the validity of titles acquired under them might be held to depend upon adherence to statutory requirements which might in some instances have been accidently and innocently departed from. A general validating section might thus have been considered desirable, and the generality of its language, though probably not intended to cover a case like the present, is still wide enough to include it. The 15th section of The Land Act 1884, on which we base our judgment, is a re-enactment of the 11th section of The Land Act 1869, in precisely the same words, and we therefore think that the illegality in the grant to Mr. Williams of the 10th day of April 1872, was cured by that section. We come to the same conclusion as that arrived at by the learned Chief Justice, though we differ from him as to the original validity of the grant impeached. We dismiss the appeal without costs."

Appeal dismissed without costs.

Solicitors for appellant, *Crown Solicitor*; Solicitors for respondent Goldsbrough, *Attenborough, Nunn & Smith*; Solicitors for Williams, *Malleson, England & Stewart.*

(Before Higinbotham, C.J., Holroyd and Hood, J.J)

REG. v. MOORE.

6th March

Criminal Law—Charge of obtaining money under false pretences—Admissibility of evidence to prove Criminal intent.

Case stated by the Chairman of General Sessions for the opinion of the Supreme Court. It appeared that one Charles Moore was tried at General Sessions on two charges of obtaining money under false pretences, the first count alleging that he on the 23rd day of April, 1888 . . . did falsley pretend to Charles Foulstone that he the said Charles Moore was the proprietor of an organized theatrical troupe and that the said troupe were ready to travel and that they had been doing a good paying business up country by means of which false pretences he the said Charles Moore did then obtain from the said Charles Foulstone the sum of L50 with intent to defraud, whereas he the said Charles Moore was not the proprietor of an organized theatrical troupe and he did not have such a troupe ready to travel and such troupe had not been doing a good paying business as the said Charles Moore then well knew. The second count alleged that he on the 6th day of September, 1889 . . . . did falsely pretend to Henry Marks Smith that he was possessed of the goodwill of a theatrical business and that he had a troupe organized and ready to start, by means of which false pretences he the said Charles Moore did then unlawfully obtain from the said Henry Marks Smith the sum of L55 with intent to defraud, whereas he the said Charles Moore was not possessed of the goodwill of a theatrical business and did not have a troupe organized and ready to start as he the said Charles Moore then well knew. In the course of the trial a constable named McManamy gave the following evidence "I arrested the prisoner on the 12th of September. I asked his name? He said "Charles Moore." I asked "Charles Valentine *alias* Russell? He—"No"—I—You are indentical with Valentine: Warrant for obtaining L50 from Foulstone: He—"You have made a mistake." I—"You are to come to the Detective Office." We met Ward at the Detective Office. He said you have got your bird. We went to the Palace Hotel and went to prisoner's bedroom. There was a young man there whom Moore said was his employé. On searching prisoner's boxes prisoner said "There are several things no use to me you can have them" (to the young man). He was throwing a lot of papers into a bottom drawer of a chest of drawers. When he came across the box produced he said "You can have that, there is only a handkerchief in it." I picked up box and opened it and found three agreements produced; also a duplicate of Smith's agreement. The six agreements are signed in the same writing one signed Valentine and five Charles Moore." The agreements referred to were to the effect that (1) he was the proprietor of a public entertainment (2) that he had a theatrical

troupe and (3) that he had the goodwill of a theatrical business. At the close of the case His Honor directed a verdict of not guilty on the second count on the grounds that as to the first pretence alleged therein there was no evidence that it was false, and as to the second alleged pretence that there was no evidence that it was made. He left the evidence of McManamy to the jury as evidence of fraudulent intent on the remaining count. The jury returned a verdict of guilty on the first and not guilty on the second court. At the request of prisoner's counsel His Honor submitted the following question to the Supreme Court:—"Whether I should have withdrawn the evidence of McManamy from the jury or whether I was right in leaving it to the jury as evidence of fraudulent intent on the first court?"

Forlonge for the prisoner:—McManamy's evidence was irrelevant and should have been taken from the jury. Evidence must be confined to the issue and similar but unconnected occurrences are inadmissible *R. v. Cole* 1 Phi. Ed. 508; *R. v. Holt Bell* C.C. 280; *R. v. Hanis* 4 F. & F. 342. When the question of intention is the subject of the accusation or one of the elements of the charge, other acts of the prisoner on different occasions if showing intention may be given in evidence: these acts however must be similar and almost simultaneous with the acts charged or if occurring a long time before or after there must be some connection between them pointing to a system *R. v. Richardson* 2 F & F. 343; *R. v. Ellis* 6 B. & C. 145; *R. v. Young* R. & R. C. C. 280. But similar acts cannot be proved merely to show a tendency to criminal acts; *R. v. Francis*, L.R. 2 C. C. R. 128; *R. v. Holt Bell* C. C. 280. In this case none of the elements necessary to make McManamy's evidence relevant exist; there was no proof that any of these agreements were fraudulent; they were made at a considerable time subsequent to the offence charged and there was nothing to connect them with the charge; the attempt to conceal them might rouse some suspicion but could not be any evidence of the prisoner's intention more than a year previous.

Finlayson for the Crown.—In such a case as this evidence of other acts is admissible to prove intent or system: *Reg v. Stephens* 16 Cox C. C. 387; *Reg v. Flanagan* 18 Cox C. C. 433 and *Reg. v. Cooper* 13 Cox C. C. 123, and whether the acts occurred before or after the offence charged they are equally admissible In this case the prisoner was charged with obtaining money under false pretences, the intent to defraud is the subject-matter of the charge, the fact that there was found in his possession subsequently agreements pointing to a similar course of conduct and signed by an assumed name together with the prisoner's attempt to conceal them is some evidence of system and shows a criminal intent.

Forlonge in reply cited *Reg v. Millard*, *Russell v. Ryan* C. C. 245 and *R. v. Moore* 1 F. & F. 73.

Higinbotham, C.J.—We think the second part of the question submitted to us must be answered in the negative namely, whether the learned judge was right in leaving the evidence of McMamany to the jury as evidence of fraudulent intent on the first count in the indictment. The evidence of the constable embraced various points bearing on both the charges against the prisoner. The prisoner was charged on the first count with obtaining on the 23rd April 1888 a sum of money from one Foulstone by fraudulently pretending that he was the proprietor of an organized theatrical troupe and on the second count with obtaining on the 6th September 1889 a sum of money from one Smith by fraudulently pretending that he was the possessor of the goodwill of a theatrical business and that he had a troupe organized and ready to start. The learned judge directed that a verdict of not guilty on the second count on the ground that as to the first pretence alleged therein there was no evidence that it was false and as to the second alleged pretence there was no evidence that it was made. The evidence of McManamy related to the time when the accused was arrested the 12th September 1889 and was to the effect that in the prisoner's room 3 documents were found in a box which the prisoner was anxious to conceal; these documents were drawn up and signed in the same handwriting but under different names and the prisoner was then brought face to face with the charge of using more than one name. That however was reasonably explained at the trial by the fact it was not uncommon in the theatrical profession to adopt assumed names. The case therefore is confined to the point as to whether the three documents found in the box and held not evidence on the second count were properly submitted as evidence of intent on the first charge. The cases cited fully establish the principal that when the intention or state of mind of the accused person is involved in the proof of a charge evidence of previous and subsequent acts indicating a similar intention are admissible and relevant to the charge and if these documents left by the judge to the jury indicated a criminal intent in relation to his previous business they might be laid before the jury and the jury might consider the intent as bearing on the first count with which the prisoner is charged. Both these documents are in my opinion incapable of being interpreted as indicating any criminal intent unless perhaps so far as in the endeavour to conceal them; they rather express a *bonâ fide* intent to enter into certain valid agreements in the profession the prisoner was engaged in. We think this evidence is not admissible to show from the state of the prisoner's mind on the second occasion any indication of the state of the prisoner's mind on the first occasion. We think the evidence should not have been left to the jury and that the conviction is erroneous and must be avoided and we direct a new trial.

Holroyd, J.—I am of the same opinion and I wish to add one word to the judgment. The three agreements contain certain statements on the part of the prisoner which if false might have been treated as evidence of false pretences, one was to the effect that he was a proprietor of a public entertainment, another that he had a theatrical troupe and a third that he had the goodwill of a theatrical business. The learned

judge has decided there was no proof that any of these statements was false. It is said the prisoner attempted to conceal these documents and that such concealment indicates that the documents were fraudulent and therefore admissible to prove fraudulent intention on a previous occasion when the prisoner made certain other statements. If the prisoner had been tried before me I should have felt bound to direct the jury that the concealment of the agreements was evidence on which they ought not to convict.

Judgment set aside. New trial ordered.

Solicitor for the Crown *Crown Solicitor*; for prisoner *A. D. J. Daly.*

(Before Higinbotham, C.J., Holroyd, and Webb, J.J.)

RE THE MELBOURNE STOCK EXCHANGE AGENCY &c. CO. EXPARTE KOZMINSKY.

7th March.

Companies' Statute 1864—*Notice of calls—Where an article of association stated that "all moneys payable to the Company shall be payable at the registered office of the Company or at such other place or places and to such person or persons as the directors may appoint" and a subsequent article stated that "the directors may from time to time make such calls on the members as they shall think fit. . . . . and each member shall be liable to pay the amount of the calls so made to the persons and at the times and places apppointed by the directors which said persons times and places shall be specified in the notices of such calls respectively," held—that where the call was made payable at the registered office of the Company it was unnecessary to state in the notice the person to whom it was to be paid.*

This was an appeal from an order of *Williams, J.*, dismissing a summons by one Kozminsky asking to be reinstated on the register of members of the Company as the holder of 200 shares which he alleged were illegally forfeited for non-payment of a call. The notice of the said call was as follows: "11th October 1888, Melbourne Stock Exchange Agency and Banking Corporation Limited. Notice is hereby given that a call of 2s 6d per share has been made payable on the 5th day of November 1888 at the registered office of the Company 44 Collins Street West Melbourne. J. B. JOSKE Manager." The applicant did not pay the call and his shares were duly forfeited. Clause 14 of the Articles of Association of the Company was as follows:—"All moneys payable by any member of the Company shall be payable at the registered office of the Company or at such other place or places and to such person or persons as the directors may appoint." Clause 15 was as follows:—"The directors may from time to time make such calls upon the members in respect of moneys unpaid on their shares as they may think fit provided that no such call shall exceed the sum of 2s. 6d. per share and that no call shall be made if an interval of three months has not elapsed since the date of making any previous call and each member shall be liable to pay the amount of calls so made to the persons and at the times and places appointed by the directors which said persons times and places shall be specified in the notices of such calls respectively." The applicant in support of his summons contended that as the notice did not state the person to whom the call was payable it was irregular and the subsequent forfeiture illegal. His Honor held the notice sufficient and dismissed the summons and from this order the applicant appealed.

Isaacs for the appellant. The notice is irregular: it is imperative that it should state the person to whom the call is payable. He cited *Sheffield & Manchester Railway Co. v. Woodcock*, 7 M. and W. 574; *Great North of England Railway Co. v. Biddulph* 7 M and W. 243; and *Newry & Enniskillan Railway Co. v. Edmund*, 2 Ex. 118.

Madden and Topp for respondents were not called on.

Per Curiam. We are of opinion that the learned judge from whom the appeal was brought was right and that the articles of association make payment of moneys payable by members of the Company at the registered office of the Company to any person allowed to be there to receive payment on behalf of the Company a valid payment. Clause 15 is somewhat obscure where it refers to the persons and the times and places appointed by the directors which said persons times and places shall be specified in the notices of such calls repectively. But we think that that refers only to other places than the registered office where such other place is appointed as that for the payment of calls. The appeal will be dismissed with costs.

Appeal dismissed with costs.

Solicitor for appellant, *Ellison*; for respondent,

(Before Higinbotham, C.J., Holroyd and Hood, J.J.)

WEEDING v. WEEDING AND ROSE.

7th March.

Marriage and Matrimonial Causes Statute 1864 (*No.* 268) *sec.* 70—*A prior decree against the petitioner in a suit between the same parties dismissing his petition for divorce on the grounds that the petitioner had been guilty of adultery and cruelty cannot be pleaded as an absolute bar to a fresh petition for divorce for subsequent alleged acts of adultery between the respondent and co-respondent.*

In August 1886 the petitioner presented a petition to the court praying for a divorce on the grounds that his wife the respondent had been guilty of adultery with the co-respondent. The respondent in her answer charged the petitioner with adultery and cruelty and the jury on an issue directed thereon having found the petitioner guilty of adultery and cruelty the court in June 1887 dismissed the petition. In 1889 the

petitioner presented a fresh petition to the court and alleged amongst other things two acts of adultery sub sequent to the previous proceedings and the co-respondent in his answer setting out the prior proceedings pleaded that the previous decree of the court was still in full force and effect and that the petition should be at once dismissed without further enquiry To this the petitioner objected that the answer was no bar to the petition and disclosed no reason why the petition should be dismissed and further replied that if he were guilty of the acts of cruelty and adultery alleged they were condoned by the respondent. His Honor Mr. Justice a'Beckett referred to the Full Court the determination of the points of law raised in the answer and reply and also a summons by the co-respondent for particulars of the alleged condonation of the petitioner's cruelty and adultery and a summons by the petitioner to settle the issues and have the case tried by a jury.

Kelly (with him *Bindon*) for the petitioner having stated the facts was stopped by the Court—

Topp (with him *O'Hara Wood*) for the co-respondent. The discretionary bar contained in sec. 70 of Act 268 becomes absolute on decree being pronounced. The Court has found the petitioner was not a person entitled to relief. The subsequent alleged misconduct of his wife did not make his moral character any better. In any case he should show some meritorious subsequent conduct to entitle him to relief. He cited *Weeding v. Weeding* 13 V.L.R. 215 and the cases there referred to.

Per *Curiam*. We can only deal with the point of law that has been referred to us. The petitioner said that he would contend that the answer of the co-respondent to his petition was no answer in law. We are of opinion that the answer of the co-respondent is no answer to the petition which charges a new act of adultery, which the petitioner alleged entitled him to relief, against his wife and the co-respondent for this alleged act of misconduct. It raises a question which has to be determined on the evidence, and by the judge or jury who deal with the case. The fact that the petitioner has been found guilty of adultery on another petition, and that the judgment of the Court upon that finding that he was not entitled to any relief, is no answer by way of estoppel to another petition, where the petitioner charges a new adultery against his wife and the co-respondent. The co-respondent's plea is, therefore, no answer to the petition, and judgment will be given for the petitioner on the plea with costs. The petitioner has taken out a summons to settle the issues to be tried before a jury, but the case has not arrived at the position where the issues can be settled, and that summons will be dismissed with costs. The co-respondent has also taken out a summons for particulars as to the alleged condonation by the respondent of the petitioner's adultery and cruelty, and that summons will be allowed, costs to be costs in the cause.

Solicitor for petitioner *Kidston*; co-respondent *Gaunson* and *Wallace*.

(Before Higinbotham, C.J., Holroyd and Hood J.J.

SPALDING v. BAILEY.

16th March.

Practice—Judicature Act 1883, *sec.* 25—*Order* 36 *rule* 39—*Point of law reserved for Full Court—A judge in chambers has no power to reserve for the Full Court a point of law arising on the hearing of a summons.*

Point reserved by a'Beckett J., in chambers.

The plaintiff applied for final judgment under Order 14 rule 1 and on hearing the summons the learned judge made the following order:—"Upon hearing the Solicitor for the plaintiffs and Mr. Leon of counsel for the defendant and upon reading the affidavit of Henry Burgess and the exhibits therein referred to and the affidavit of the defendant and by consent it is ordered that the following question of law arising in this action be reserved for the opinion of the Full Court, viz:—"Whether upon the facts stated in the said affidavits the plaintiff is entitled to judgment in this action and that the plaintiff's summons for judgment be adjourned till after the determination of the said question and that in the meantime all further proceedings in this action be stayed &c., &c."

Isaacs for the plaintiff stated the facts and read the learned judge's order. [*Hood J.* How does this matter come before the Court?] It is a point reserved under section 25 of the *Judicature Act*. [*Hood J.*, The only power to reserve any point under that section is subject to any rules of court and the only rule dealing with the matter is order 36 rule 39 which confines the power of reservation to points of law arising *at the trial.*] Under section 10 sub-section 10 of the *Judicature Act* a judge sitting in chambers has power to refer any business to the Full Court. [*Chief Justice.* This is a point reserved; it is different from a reference.] [*Holroyd J.* The word "business" in sect. 10 sub-sect. 10 means I think the whole matter before the judge. I do not think a judge would have power even to refer to the Full Court part of a summons like this.]

Leon, (with him *Cussen*) for the defendants referred to *Lane v. Casey* 12 V.L.R. 380.

Per Curiam. The case must be struck out.

Solicitors, for plaintiff, *Braham and Pirani*; for defendant, *Gaunson and Wallace.*

SUPREME COURT SITTINGS.

(Before Webb, J.)

MATHIESON AND OTHERS v. THE MERCANTILE FINANCE TRUSTEES AND AGENCY COY OF AUSTRALIA LTD. AND OTHERS.

Feb. 19th, 26th.

Transfer of Land Statute No. 301, *s.s.* 42, 84, 85—*Mortgage—Registration—Notice—Sale.*

Land under the operation of the above statute being the subject of a mortgage is not a "security" for the

sum advanced while the mortgage remains unregistered; accordingly before the mortgagee can take any step towards selling the land, the mortgage must be registered; e.g., a notice under sec. 84 to be valid must be served after the registration of the mortgage.

Action by Archibald Mathieson and George Martley Davis (trading as Mathieson and Davis) and John Napper against The Mercantile Finance Trustees and Agency Co. of Australia Ltd. and C. J. Ham and T. J. Ham (trading as C. J. & T. Ham).

The facts are as follows:—One Patterson being the registered proprietor of certain land in fee simple under Transfer of Land Statute, on the 27th January 1886 executed a mortgage (under the provisions of the said statute and in the prescribed form) of the said land to the Federal Bank of Australia Limited. On the 4th and 9th July the Federal Bank of Australia served notices dated respectively the 4th and 9th July 1887 on Patterson in accordance with the provisions of section 84 of the said statute. On the 23rd July 1888 the Federal Bank of Australia transferred their mortgage to the Mercantile Finance Trustees and Agency Co. Limited who upon the same day caused the mortgage to be registered. On the 13th September 1888 the last-mentioned company sold to the plaintiffs (under the power of sale enabling them in that behalf) the said land; it was verbally arranged at the same time that the defendants C. J. and T. Ham who were acting on behalf of the defendant company should not part with deposit or promissory notes till the title had been accepted by the plaintiffs. After the last-mentioned sale the plaintiffs discovered that the notice given to the mortgagor under section 84 of the statute had been given prior to the registration of the mortgage; they, in consequence, refused to accept title, and as the defendants C. J. and T. Ham had handed over the deposit and promissory notes to the defendant company it was thought advisable to join them as defendants. The plaintiffs claimed (1) Repayment of all moneys paid and return of the promissory notes unpaid and indemnity against payment of all promissory notes yet unpaid but negotiated by the defendant company; (2) if necessary, a declaration that at the date of the said contract of 13th September 1888 the defendant company had no right to sell the said land &c.; (3) alternatively with (1), Damages being the amount which the plaintiffs have paid and are liable to pay under the said contract.

Higgins (with him *Isaacs*) appeared for the plaintiffs.

Topp (with him *Mitchell*) appeared for the defendants.

[The arguments sufficiently appear in the judgment.]

Cur adv vult.

His Honor said:—The only point arising for decision in this case is whether a mortgagee under a mortgage of land under the Transfer of Land Statute, the mortgage not being registered under the act, can proceed before registration so far to execute the power of sale under the act as to serve upon the mortgagor a notice under section 84 to pay the money, and whether if subsequently the mortgage be registered under the act a valid sale under section 85 can be made and based upon the prior notice to pay

Looking at the various sections of the act, I am of opinion that before any step towards a sale can be taken the mortgage must be registered. The various sections follow in sequence, and hang one upon another. Section 42 provides that no instrument until registered in manner therein provided shall be effectual to render any land under the operation of the act liable to any mortgage, but upon such registration the land shall become liable. Section 84 provides that a mortgage under the act shall, when registered, have effect, as a security. Therefore, until registered, it is not a security, and the money is not "secured" on the land. The section then proceeds, "In case default be made in payment of the principal sum 'secured,' and such default be continued, &c., the mortgagee may serve on the mortgagor a notice in writing to pay," &c. But no default can be made in payment of the sum "secured" until it is secured, and it is not secured until registration of the mortgage. Then section 85 provides that if such default in payment of the "sum secured" continue for the prescribed time after the service of such notice the mortgagee may sell. Therefore the power of sale only arises on default in payment after service of a notice under the act, which notice can only be effectually served after registration of the mortgage, and no registration of it after service of the notice but before sale will validate the antecedent notice, or render a subsequent sale good. Here, after the sale in question a fresh notice was served, and it is argued that such notice being valid under the act rendered the prior sale effectual. But such notice only raised the power of sale, and enabled it to be validly exercised. It could not *ex post facto* validate a sale previously invalid. It has been argued for the defendants that this mortgage, although not authorising a sale under the act, was good outside the act as between the parties to it, and as between them authorised a sale. Such a principle has been held to apply to unregistered bills of sale as in *Tidyman v. Collins* (4 V.L.R., L. 478), and if this were an action upon the covenant in the mortgage, I might be pressed with the argument. But here the mortgagor's vendors, can only make title under the act, and unless the provisions of the act are complied with can give no title whatever to the purchasers. Section 87, which is the only section under which title can be made, provides that upon the registration of any transfer signed by a mortgagee, "for the purpose of such sale as aforesaid," the estate and interest of the mortgagor shall pass to and vest in the purchaser freed and discharged from all liability on account of such mortgage. But "such sale as aforesaid" is a sale after a valid notice under section 84, and here there was no such valid notice. The defendant company is therefore unable to give a good title, and the plaintiffs are entitled to a return of the money paid by them both as deposit and in payment of such of the bills as have fallen due, and a return of the bill unpaid, or an indemnity if such bill is in the hands of an innocent holder for value. It has been admitted at the bar that the defendants Ham improperly parted with the deposit and bills,

and that the plaintiffs, if entitled to relief against the defendant company, are also entitled to the same relief against them. Judgment for the plaintiffs for £3,553 10s. and costs. Order the defendants within seven days to deliver up to the plaintiffs for cancellation the promissory notes still current and unpaid, or otherwise to indemnify the plaintiffs against the payment thereof, such indemnity, if the parties differ, to be settled in Chambers.

Judgment for plaintiffs.

Solicitors for plaintiffs *Madden* and *Butler*; for defendants *Fink Best* and *P. D. Phillips*.

SITTINGS IN BANCO.

(Before Higinbotham, C.J., Holroyd and Hood, J.J.)

In re Nolan.

17th March.

Licensing Act, 1885 (*No.* 857) *sec.* 70—*Application for renewal of victualler's licence—the Licensing Bench is justified in refusing the renewal of a victualler's licence on its being proved to their satisfaction that the applicant is a habitual Sunday trader, whether he has been prosecuted for that offence or not.*

Case stated by the Licensing Court for the opinion of the Supreme Court. One Nolan applied to the Licensing Court at Coburg for the renewal of his victualler's licence. The application was objected to by the inspector of the district on the grounds that the applicant was an habitual Sunday trader and refused by the Bench on the ground that the evidence showed the applicant was an habitual Sunday trader and that the applicant on being called as a witness on his own behalf did not deny the charge. The Bench stated a case for the Supreme Court as to whether their decision was right in law.

Section 70 of "*The Licensing Act*" under which the application was made is as follows:—"The objections to the granting of an application for a licence may be one or more of the following:—That the applicant is of bad fame and character, or has within six months previously forfeited a licence, or that the applicant has been convicted of selling liquor without a licence, or of selling adulterated liquor within three years. . . . The objections that may be taken to the renewal of any of such licences may be one of the following:—That the applicant is of bad fame and character or of drunken habits, or, if the application be for a victualler's licence, that the premises in question are not maintained at the required standard, and also in any case any other objection (whether or not of the same kind as any of the preceding objections) which appears to the licensing court to be sufficient."

Sir Bryan O'Loghlen (with him *C. A. Smyth and Goldsmith*) for the applicant. The Bench in exercising its discretion in refusing to renew a license must exercise it legally and under the Act. In this case they have not done so. The Act is penal and should be construed strictly. There was no evidence before the Court of the appellant being guilty of Sunday trading: that offence is specially provided for by the Act and the only way to prove it is to produce a conviction, in this case it does not appear that the applicant has ever been prosecuted for such an offence. [Hood, J.—The justices do not exceed their jurisdiction in themselves enquiring into the applicant's fitness. *Reg. v. Alley*, 9 V.L.R. L. 19.] The bench has at the hearing tried the applicant for a multiplicity of offences which should have previously been tried separately and thus they clearly exceed their jurisdiction. The word 'sufficient' reasons means such as those in the preceding part of the section.

Agg for the Licensing Inspector was not called on.

Higinbotham, C.J.:—The question which we have to decide is whether the determination of the majority of the judges in the Licensing Court, in refusing the renewal of the applicant's licence, was erroneous in point of law. The question turning on the 70th section of the Licensing Act 1885, No. 857, in the argument of the meaning of this section, we think the learned counsel who has argued it has taken a fundamentally erroneous view of the character and operation of this section. In connection with cases like the present—applications for renewals of a licence—it appears to have been assumed that in the case of an objection similar in character to a charge of an offence under the act that an inquiry by the justices who had to deal with the application for renewal is similar to that which is entertained by justices who deal with an offensive charge—that seems to be an entirely erroneous view of the end, object, and effect of this section. The section deals with objections which may be urged either to the original application for a licence or to an application for an annual renewal of a licence. It provides that petitioners may take certain objections in both cases. The character of these objections was generally determined by the nature of the licences. In the case of a victualler's licence under this act, it has been more than once observed from this Bench, and I do not think that it has been remembered, that a victualler's licence is a licence of a person in respect of a place—a licence to a person in respect to his supposed or his real fitness to carry on a business highly advantageous to him and privileged by the law, and also a licence in respect of the place where he intends to carry on that business, and in respect of which the law demands a certain amount of accommodation for the convenience and reception of the public who visit it. The objections that may be taken to the granting or renewal of a victualler's licence appear to be objections founded either upon the supposed or alleged personal unfitness of the applicant to carry on the business or to the defective accommodation in the place in which he carries on his business. Where that question comes before the Bench, they do not deal with the alleged objection as to whether it be an objection which might constitute a charge of an offence under the act, or as an objection of a totally different charac-

ter not regarded as an offence under the act. They have to deal with it, not as an offence, but in reference to its application to the person who asks the favour from the law of being allowed to continue to carry on a privileged business. If a man has a bad reputation and character, that of course is a sufficient reason why he should not be allowed to go on in this business, as also if he is of drunken habits, if he has within six months forfeited his licence for misconduct and if he has been guilty of selling liquor without a licence, or selling adulterated liquor within a period of three years. Then the section goes on to say—"And also in any case (that is, either in case of an application for a licence or for the renewal of a licence) the Bench may entertain any other objection, (whether or not of the same kind as any of the preceding objections) which appears to the Licensing Court to be sufficient." I entirely accede to the argument urged, that the sufficiency of any objection not expressly specified in the section must be sufficient within the reasonable judgment of reasonable men, and that an objection not going to show that the applicant or those who might be connected with him in carrying on the business of the place where he is carrying it on are in any respect unfit for carrying on that business, would be an objection which the justices would not be justified in entertaining or regarding as sufficient. But any objection that goes to show that the applicant has been a person unfit to carry on the business, or that his conduct of the business has been improper and likely to be injurious to public morals and public decency, and that therefore he will probably be unfit to carry on the business in future, would be perfectly valid, not as a charge for which a penalty has to be inflicted, but as an objection on which a renewal may be refused. Then, of course, there must be evidence of an objection of that character to justify the Court in withholding the licence. In this case the objection taken has been that the applicant has been habitually violating the law in respect to Sunday trading. That that is an objection which goes to the root of a man's personal fitness to carry on this business, I think cannot be questioned for a moment in a court of law, which recognises the application of this law, and the obligations resting upon persons enjoying the privileges of the law. The evidence in support of the objection is also abundantly sufficient to justify the conclusion at which the majority of the Bench arrived. It was proved by numbers of persons that on frequent occasions during the currency of the previous licence persons were seen on Sundays crowding about this house, persons were seen admitted into the house, going in sober, and were seen coming out drunk. The applicant, who was called as a witness to give evidence on this objection, did not venture to deny the truth of these statements. He practically admitted them to be true. We think, therefore, that the objection on which the Licensing Bench have refused this application was one which they were justified in entertaining, and that it was a sufficient objection on which to base their decision, and that it was supported by sufficient evidence to justify their conclusion in point of law. We affirm the determination in respect of which the case is stated, and we order the applicant to pay the costs.

HOLROYD, J.—I agree with the judgment of the Court that the decision of the Licensing Court is correct. I do not wish, however, to be understood as assenting to, or dissenting from, the proposition that on an application for the granting of a licence in the first instance the Licensing Court could entertain other objections than those which were specifically mentioned in the section. I would rather not give any opinion on that point. The grammatical construction of the section is against the notion that the Licensing Court had power on an application for the grant of a licence to go beyond the objections stated in the first part of the section. I can imagine many weighty arguments that can be urged in support of the policy of restricting objections in the first instance to those which the Legislature has thought proper to specify. Here, however, it is quite clear that any other objection which the Licensing Court held to be sufficient other than those specifically mentioned by the Legislature may be entertained on an application for the renewal of a licence.

HOOD, J.—The only question which we have to consider is whether the determination of the Licensing Court is erroneous in point of law. That disposes of what has been said about the hardship of the case. That is a matter entirely for the Licensing Bench or the Legislature. All we have to consider is whether the Licensing Bench made a mistake in point of law when it decided that, inasmuch as the applicant had been guilty of Sunday trading, it would not allow him to continue. The Legislature had started to define in the section what objection could be taken, and then put in a drag net to cover everything. So long as the objection taken was one which would reasonably lead to the conclusion that the granting of a license may cause a violation of the law, the Licensing Court had jurisdiction to deal with it, and may refuse the license. This was no doubt a great power to give to the Licensing Court; but it is one which I think they ought to have, because they had to consider objections which the Legislature could not possibly name, but which must from time to time occur. This case seems to me an illustration of the wisdom of giving great power to deal with such cases. Here is a man who continually breaks the law. The police, for some reason, whether, because they cannot get informers, or whether because they could not get sufficient evidence, do not prosecute. And it is contended on his behalf that he is to be entitled to go on violating the law till he is prosecuted. The answer to that is that this section has taken future probabilities into consideration. The section does not provide for the punishment of past offences, but to prevent offences occurring in the future. I may say that I also make the same reservation as Mr. Justice Holroyd has done as to whether this applies to an application for a first licence. It is unnecessary, however, to decide that in dealing with this case. I concur with the judgment of the Court.

The question, when answered, was that the objection that applicant was an habitual Sunday trader was one which could be entertained on the application for the renewal of a license, and that there was evidence to support the objection.

Solicitors for applicant—*Gaunson and Wallace.*
Solicitor for Inspector—*Crown Solicitor.*

IN CHAMBERS.

(Before Hodges, J.)

ROW v. SMITH.

21st, 24th March.

Common Law Procedure Statute 1865 (No. 247) ss. 332, 333. *Applications under sections 333 of Act No.* 247 *should not be made ex parte, and should be made to the Court and not to a Judge in Chambers.*

Application on behalf of the defendant, who had been arrested under a *Ca Re* and who had deposited the sum indorsed on the writ of *capias* together with £10 for costs and who had subsequently perfected special bail, to have the money so deposited and paid into Court by the sheriff paid out of Court to him.

Mr. Bryant.—I move *ex parte* that this sum of money be paid out to the defendant. The only case I can find on the subject is *Bell v. Stewart* 1 AJR 92, but it does not show whether the application was made on notice or not.

HIS HONOR.—It seems to me that that case practically decides that the application should be made to the Court and not in Chambers. I will look into the matter.

HIS HONOR on a subsequent day said.—This was an application made by the defendant to me *ex parte* for an order that a certain sum of money which he had deposited with the sheriff on his arrest under a *Ca Re* should be paid to him out of Court he having perfected special bail. The application is made under sec. 333 of "*The Common Law Procedure Statute* 1865," the latter portion of which provides that "all subsequent proceedings as to putting in and perfecting special bail or of making deposit and payment of money into Court instead of putting in and perfecting special bail shall be according to the practice for the time being of the said superior Courts or as near thereto as the circumstances of the case will admit. This section is nearly a transcript of the English section 1 & 2 Vict. c. 110 sec. 4, which leaves the procedure to be taken in the same way as it was done before the passing of the Act. That practice was determined by 43 *Geo.* III., c 46 sec. 2, which provided that applications of this nature should be made by way of motion to the Court, and therefore could not be made to a Judge in Chambers. The practice as stated in *Chitty's Archbold* 12th Ed. p.p. 803, 804, and from the authorities there cited it appears that the application is not made *ex parte*. So that I dismiss the summons on both grounds. I am not determining as to whether the application should be made by motion or by way of order *nisi*.

Solicitors for defendant, *Westley & Demaine.*

Before Webb, J.

HICKLING v. KELLY. DALY (Garnishee).

15th April.

Rules of Supreme Court 1884, *order XLV.* r. 1. *Garnishee proceedings.—Affidavit.—The affidavit filed in support of an application for a garnishee order* NISI *must be sworn by either the judgment creditor or his solicitor.*

Garnishee order *nisi.*

Mr. Coldham for the judgment creditor.

Mr. Eagleson for the garnishee. The affidavit on which the order *nisi* was granted was made by the judgment debtor and not by the judgment creditor or his solicitor as required by order XLV. r. 1. The order is therefore bad.

Mr. Coldham.—The order *nisi* was obtained on insufficient materials, but the garnishee has appeared on its return and has filed an affidavit in the matter. The garnishee should have applied to set the order *nisi* aside or else should not have appeared in answer to it. The order *nisi* is merely intended to bring the garnishee before the court; he is here now, and I submit the matter should proceed.

HIS HONOR.—I think it is the proper practice for the garnishee to attend on return of the order *nisi* and take any objection he can. Order XLV. r. 1. is explicit, and provides that the affidavit filed in support of the application for the order *nisi* shall be sworn, either by the judgment creditor or his solicitor. As the affidavit in this case has been sworn by the judgment debtor, I must discharge the order *nisi* with £3 3s. costs. I certify for counsel.

Solicitor for judgment creditor, *F. J. S. Stephen*; for garnishee, *A. D. J. Daly.*

SITTINGS IN BANCO.

(Before Higinbotham, C. J., Holroyd and Hood, J. J.)

IN RE WIGMORE.

13th March.

Habeas Corpus—Custody of child. Where a child had been left by its mother in the care of another for a month and the mother afterwards disappeared, without claiming it (custodian who meantime supported the child) having some years after placed it at school and paid for its maintenance was held entitled, to have the child restored to her custody by the school authorities—Semble in such a case the wishes of a child of 12 *will not be consulted—The ages of* 16 *for girls and* 14 *for boys in criminal proceedings is a fair test of the age when a child can form ideas on such matters.*

This was a reference to the Full Court by Hood, J., in Chambers, in relation to the custody of a coloured child, one Frances Wigmore. Mary Jane Wigmore claimed to be the guardian of the child, and had made affidavits to the effect that prior to the year 1881, she and her husband lived in England: that the child had been left with Mrs. Wigmore by the mother in the beginning of the year 1881 to be taken care of for a month: the mother of the child subsequently wrote asking if Mrs. Wigmore still had the child. A reply to this letter was sent, but was returned through the dead letter office.

Mrs. Wigmore and her husband came to Victoria in 1882 bringing the child with them.

In 1887 the child was placed, for the purpose of schooling, with a Miss Sutherland, who, Mrs Wigmore afterwards learned, was the Secretary of the Scots' Church Neglected Children's Aid Society. she now desired to have the child returned to her to be brought up at the Roman Catholic Orphanage at Carlton.

A writ of *habeas corpus* was granted on these affidavits, and the child brought before the Court.

Efforts at an arrangement having failed, the case was referred to the Full Court by Mr. Justice Hood.

Mr Bryant applied, on these facts, that the child should be given up to the care of Mrs. Wigmore.

Mr. Johnston (to oppose). The writ of *habeas corpus* should not have been granted in this case. Mrs. Wigmore has not proved that she had a legal right to the custody of the child. Owing to the manner in which she, according to her statement, acquired the custody of the child, she is not entitled to a writ of *habeas corpus*. She is not in the position of a mother or testamentary guardian, and has no better title to the custody of the child than the Society which has the present charge of her. According to the facts the child was really derelict having been abandoned by the mother.

It is submitted further that the wishes of the child should be consulted. There is no absolute rule as to the age at which a child is presumed to be capable of consenting with whom she will reside. In this case the child is greatly opposed to being removed from her present position. This desire to remain where she is, is based upon a deep aversion to her previous custodian.

HIGINBOTHAM, C.J. (after stating the facts). The circumstances of the case are somewhat remarkable. In spite of reverses Mrs. Wigmore appeared to have given care and attention, and to have been willing to expend her small means in maintaining and taking care of the child. Subsequently she was employed to go to service, and hearing of the benevolent society, the Scots Church Neglected Children's Aid Society, with which Mr. Marshall and Miss Sutherland were connected, she made application through Mr. Hill. The society received the child not as the guardians of a waif or derelict child, but as the agents of the person who for seven years had taken the place of the child's mother, and upon a promise by Mrs. Wigmore that she would pay for the board of the child. It is now contended that Mrs. Wigmore was a person who had no authority to demand the custody of the child. We entirely dissent from that view on the admitted facts of the case. Mr. Marshall and Miss Sutherland accepted the child as the paid agents of Mrs. Wigmore, and they could not be allowed to say that that lady was not in a position to claim the restoration of the child at any time she thought proper. An application has been made that the child should be examined as to her wishes. It was alleged that the child, on hearing of the wishes of Mrs. Wigmore, expressed great dissatisfaction, cried bitterly, and made certain statements about Mrs. Wigmore. It is greatly to be regretted that inquiries beyond the child were not made before those statements of the child were put on record They were denied by Mrs. Wigmore, and the conduct of Mrs. Wigmore in regard to the child—which was the only conduct indicating character which the Court has before it—was such as to make those statements wholly improbable. It is hardly to be believed that a person who was keeping the child of another when she was under no obligation to expend her scanty means on her, should at that time be treating the child and misconducting herself in the way in which the child appeared to have stated. Those statements were denied by Mrs. Wigmore, and the Court was disposed to place entire faith in Mrs. Wigmore's denial. The Court does not desire to examine the child, and is of opinion that even if the affidavits disclosed grounds on which it might be desirable to examine her, an examination could not take place on this application of Mrs. Wigmore. The established rule of English practice is that the child's wishes were not to be consulted, nor was the child to be examined by the Court until he or she had attained the years of discretion—such discretion as might enable her to form ideas as to her mode of living. That age has been fixed in analogous criminal proceedings at 16 years for girls and 14 years for males. This child is very much younger—about 12. I shall not refer to the question of religion. It is unnecessary to do so. It is now proposed that the child should be put in the care of the Roman Catholic Orphanage at Carlton, and the clergyman connected with the institution has certified that the child will be received. That is a further guarantee that Mrs. Wigmore has not disqualified herself to judge as to whom and where this child—she herself being unable to take care of her—should be placed. We understand, of course, that the undertaking of the Rev. E. Kelly will be carried into effect, and that Mrs. Wigmore will transfer the child to the care of the Roman Catholic Orphanage of St. George's. The writ of *habeas corpus* will be confirmed, and the child must be given up to Mrs. Wigmore.

HOOD, J. I am still of opinion that the alteration in the religion of the child would not be a benefit, but I consider that we have nothing to do with that. In my opinion the applicant was the legal custodian of the child, and the persons who had had charge of her were merely agents. It would be a terrible

doctrine of law if people in the position of those agents, having got the child, were entitled to say to the person from whom they got her, "Now you have no title to her."

The child was handed over to Mrs. Wigmore, who took her away.

Order for habeas absolute.

Solicitors for applicant, *Madden and Butler.*

Solicitors for respondent, *McKean and Leonard.*

(Before Higinbotham, C.J., Holroyd and Hodges, J.J.)

REG. v. KILKENNY.

13th March

Licensing Act 1885 (*No.* 857) *s.* 98 *and* 99—*Competence of the defendant and his wife to give evidence. The words in Section* 99 "*in all cases under this Act the defendant and his wife shall be competent to give evidence*" *are confined to offences under section* 99 *and the preceding section* 98.

Point reserved by Hodges, J. for the opinion of the Full Court.

A man named Thomas Kilkenny was summoned under section 125 of the Licensing Act No. 857, to show cause why an order should not be obtained against him forfeiting certain liquor and vessels in his house, on the ground that such liquor and vessels were in his house for the purpose of being illegally sold or disposed of. At the trial before the Justices he was called as a witness on his own behalf, and he stated that he had never sold liquor at his store at Nooralim. This statement it was said was false, and he was prosecuted for perjury. He was tried for the alleged perjury before Mr Justice Hodges at the Assize Court at Echuca, and was convicted. It was contended on his behalf that he could not legally be called as a witness on the hearing of proceedings against him under section 125, and therefore could not be charged with the crime of perjury. The question was reserved for the Supreme Court whether the defendant could under the circumstances be convicted of perjury.

Pennefather for the prisoner. The prisoner was charged under section 125 of the Licensing Act, and under that section gave the evidence on which he is now charged with perjury. He was incompetent as a witness, and therefore the charge of perjury fails. The only section making the defendant a competent witness is section 99, and the words "in all cases" in that section must be confined to the offences dealt with in that section (He was stopped by the Court).

C. A. Smyth for the Crown—The words "in all cases" in section 99 are general and must be construed in reference to all offences under the Licensing Act. Though it is strange that words making such a sweeping change in the law should not be inserted in a separate section, still they are wide enough to embrace the entire Act. The Court will construe them accordingly. On the general principle of interpretation he cited *Reg. v. Smith*, 12 Q.B.D. 481.; *per Coleridge*, C.J. at page 483; *Nutt v. Tappin* 8 Q.B.D. 252; *per Jessel*, M.R., and *Gray v. Pearson*, 6 H.L.C. 106.

HIGINBOTHAM, C.J.—Every order of a Justice or Justices made under section 125 of the Licensing Statute is to be deemed a summary conviction, imposing a fine, penalty, or forfeiture exceeding the sum or value of £5, within the meaning of any provision in any act relating to proceedings before Justices by which an appeal is given to a Court of General Sessions of the peace from summary convictions of Justices and an appeal shall be from such order to a Court of General Sessions of the peace. The proceedings under this section are to be commenced by information on oath before a Justice, and the order made upon it deemed to be a summary conviction for the purposes of appeal. By section 45 of the Evidence Statute, on the trial of a person liable to summary conviction, the accused is not competent or compellable to give evidence for or against himself. In this case the person acused was presented for perjury in having in the course of proceedings under the 125th section given false evidence after having been sworn on his own behalf, and was found guilty by the jury of having given false evidence. It was contended on the trial of the charge of perjury that the prisoner was not competent or compellable to give evidence on the charge against him, and therefore he could not be guilty of perjury for the false evidence given by him on that proceeding. In answer to that it was contended that he was a competent witness under section 99 of the same Act No. 857. That section with section 98 relates to what was known as the Sunday trading clauses. It was provided by section 99 that "in all cases" under this Act the defendant and his wife shall be competent to give evidence. It was contended for the Crown that the words in that section 99 "under this Act" included all cases where an offence was charged under the Licensing Statute. It was contended on the other side that the words "under this Act" were confined to offences under section 99, and the preceding section 98. We think the latter contention is right. These two sections provide for charges of a very peculiar description. The law requires that a licensed house shall be kept closed on Sunday. An offence charged under section 99 is one punishable for secretly selling liquor in a house which, according to the law, ought to be closed on Sunday to persons not authorised to ask for or to receive liquor. In dealing with a charge of this kind, which is difficult of proof and difficult of refutation, it appears to us that there was a special reason why the persons most competent to speak to the charge should give evidence upon it. For if the Justices were satisfied that the person charged with the offence of selling liquor on Sunday truly believed that the purchaser was a *bona-fide* traveller, boarder, or lodger, and further, that the defendant took all reasonable precautions to ascertain whether or not the purchaser was such traveller, boarder, or lodger, they should dismiss the case as against the defendant. And the section goes on to say, "And in all cases under this Act the defendant and his wife shall be

competent to give evidence." The defendant would be the person best qualified to give the evidence referred to in the section, and it was a reasonable indulgence to give to a person charged with that offence that he should give evidence on his own behalf. We are of opinion that the language of section 99 as to a defendant and his wife being competent to give evidence refers only to charges under section 98 and 99, relating to Sunday trading. To constitute the crime of perjury it must be proved that in addition to the statements made being false the prisoner was lawfully required to give his evidence. Here this witness was not lawfully required to give evidence on the trial of the charge against him under section 125 of the Licensing Act. Consequently he could not be convicted of perjury, and the conviction must be quashed.

HODGES, J.—I am of the same opinion and as I reserved the case I wish to add a few words. The prisoner was summoned to show cause, under section 125 of the Licensing Statute, why certain liquor on his premises should not be forfeited. He was called as a witness on his own behalf, and made a statement which the jury on the trial against him for perjury found to be wilfully false, and they consequently convicted him of perjury. The question is whether he was rightly so convicted. In every case of perjury there must be two factors—one, a tribunal or person competent to administer the oath; the second, a person competent to take the oath. It was admitted here that the tribunal was competent to administer the oath. The only question is whether the witness was competent to take it. It is not disputed that the proceedings under section 125 of the Licensing Act against the prisoner were criminal proceedings, and that being so he was *prima facie* not competent under English law to take an oath on the trial of these proceedings. But it was said that section 99 of the Licensing Act enabled the prisoner to give evidence on a proceeding against himself under section 125. I do not agree with that construction. In my opinion, the words "in all cases" in section 99 refer back to the words "the case" immediately preceding, the Legislature intended the words "all cases" to cover only the cases previously referred to in the section. The words themselves bear it out, and these are strong reasons for that meaning to be given to the section. It is provided that the Justices shall dismiss the case "if the Court is satisfied that the defendant truly believed that the purchaser was a *bona-fide* traveller, boarder, or lodger; and further, that the defendant took all reasonable precautions to ascertain whether or not the purchaser was such traveller, boarder, or lodger." The Legislature there made one of the tests of the offence the individual's *bona-fide* belief, and having made that a test as to whether he was guilty or not guilty, it immediately afterwards provided that he should be able to testify as to his *bona-fide* belief, It appears clearly from the section that the Legislature meant to confine the power to the husband and wife to give evidence to cases under that section. I can hardly believe that the Legislature meant to make such an enormous alteration in the fundamental principle of the law as to make a husband competent or compellable to give evidence against his wife, or a wife competent or compellable to give evidence against her husband in every case under the Licensing Act, without stating their intention clearly. It is hardly likely they would have made such an alteration in a fundamental principle by the insertion of a few words in the middle of a section. If they had intended such a grave and important alteration in the law, they would have made it in a separate section.

The conviction was quashed, and the prisoner was discharged.

Solicitor for prisoner—*Connelly and Tatchell.*
Solicitor for Crown—*Crown Solicitor.*

(Before Higinbotham C.J., Williams & A'Beckett J.J.)

WEIR v. SHEPPARD.

Nov. 1st, 1889.

Landlord and tenant—lease—option of renewal, "provided that A.S. conducts his business in a respectable and business-like manner, and that I am satisfied with him as a tenant." Meaning of the words "in a respectable and business-like manner." Intention of the parties.

Appeal from judgment of Kerferd J.

The facts are sufficiently set out in the judgment.

MacDermott (with him *Box*) for plaintiff appellant. —The evidence is all one way, and there can be no doubt that this hotel was not conducted in a respectable and business-like manner, nor did the lessee give satisfaction as a tenant.

Card-playing for money and drinking have been carried on until early morning.

There was habitual Sunday trading, and not merely occasional breaks of the licensing law.

The defendant was fined £5 for allowing gambling on his licensed premises.

The question is—has the lessee complied with the condition in the lease as to renewal? It is submitted on the evidence that defendant has not carried on this business in a respectable and business-like manner, and so far has not given satisfaction as a tenant.

He is therefore not entitled to a renewal of the lease. He cited *Job v. Bannister* 2 K. & J. 374, and *Gresham Life Assurance Co.*, L.R. 8 Ch. 446.

Topp for the defendant respondent.—What we have to enquire into here is not whether the defendant has occasionally permitted Sunday trading or card-playing, nor whether he has so far broken the law as to have rendered himself liable to a fine for allowing gambling to be carried on in his licensed premises, but whether he has broken the condition for renewal in the lease? The objection by plaintiff to defendant as a tenant is not *bona fide*, but merely to oust him and secure a higher rent.

If the defendant had permitted drunken or disorderly persons to assemble upon his premises and had served them with liquor, or had allowed thieves or

prostitutes to frequent the place, the case might be different, but there is no evidence that he did so.

The question is—what did the parties mean by the insertion of those words? Not necessarily the carrying on of the business in a strictly legal manner, without infringement of the licensing law, but rather carrying it on in such a manner that the reputation of the house should not suffer.

The question is entirely one of fact, and the judge below having found all the facts in favour of the defendant, that finding will not be reversed unless the Court is of opinion that on the facts no reasonable person could have arrived at such a conclusion; in this case there is ample evidence to sustain his finding and therefore the judgment must stand.

C.A.V.

HIGINBOTHAM, C.J., read the following judgment:—This is an appeal from the judgment of Mr. Justice Kerferd. The action was brought to recover possession of the Farmers' Arms Hotel, in the town of Euroa. The hotel was let to the defendant by the plaintiff for the term of three years, with option of renewal, under the following agreement:—"Euroa, June 25, 1885.—I, John Weir, hereby agree to give Arthur Sheppard a lease of the hotel premises, Farmers' Arms Hotel, Kirkland-street, Euroa, for the term of three years, with the option of a renewal of the lease, at a yearly rental of £130 payable quarterly, lease to date from the 1st day of September 1885. Renewal only to be given provided that Arthur Sheppard conducts the business in a respectable and business-like manner, and that I am satisfied with him as a tenant.—JOHN WEIR, ARTHUR SHEPPARD." The defendant in his counter claim claimed specific performance of this agreement for a renewal of the lease, alleging compliance with the proviso. The plaintiff alleged in his defence to the counter claim, that the defendant did not conduct the business in a respectable and business-like manner, and that he, the plaintiff, was not satisfied with him as a tenant. The learned judge found as a fact that the house had been conducted in a respectable and business like manner, and that the dissatisfaction of the plaintiff with the defendant as a tenant was not a *bona-fide* one; and he adjudged that the plaintiff should recover nothing against the defendant in respect of his statement of claim, and that the defendant was entitled on his counter claim to a specific performance of the agreement, and to a renewal of the lease for three years from the first day of September 1888. There was evidence abundantly sufficient to justify the finding of the judge that the dissatisfaction of the plaintiff with the defendant as a tenant was not *bona-fide*. The plaintiff appears to have desired to get possession of the hotel for his own use unless the tenant would consent to pay additional rent of 10s a week. The finding that the business was conducted in a business-like manner was also warranted by the evidence. On the question whether the business was conducted in a respectable manner evidence was given that the defendant had been prosecuted for allowing gambling in his licensed premises, and had been fined £5. Repeated violations of the law against Sunday trading were proved. One witness, William Dunlop, deposed that he had got and paid for drink in the hotel more than once on Sundays, he not being a traveller. Another, George Auld, stated that he had been there on Sunday and had had a drink, and that he might have been there a dozen times on Sunday and got and paid for drink, not being a traveller. A third witness, James Proud, stated that he used to get drink in the house on Sunday and that he had been there with company on the Sunday, going in by the back door. The defendant admitted that it was true that he had sold drink on Sunday to those witnesses, and he declined to answer if he had sold it to other people, or whether he had had dice thrown for drinks or not. He swore that he could not say if he sold drink every second or third Sunday. This evidence points, not to a single or an occasional breach of the provisions of the statute with regard to Sunday trading, but to a wilful habitual disregard of the law by the defendant in the conduct of his business. Then was this business, so conducted, conducted by the defendant in a respectable manner? The learned judge, our lamented colleague, informed us that he interpreted the word "respectable" in this proviso as equivalent to "reputable" and there was nothing in the evidence to show that the reputation of the hotel had suffered through the conviction of the landlord for allowing gambling on the premises, or through the repeated violation of the law committed by him, or through any disorderly conduct of the business producing scandal and alienating custom. If I could agree in this interpretation of the word "respectable," I should not dissent from the conclusion that the business of this house was conducted in a respectable manner. The house might continue to enjoy a good repute if the wilful misconduct of the licensee should not be generally known, or if, though known, it should not be condemned by the usual customers of the house, some of whom were themselves violators of the law. But this is not the primary or even the proper meaning of the word. "Respectable" as applied either to a person or to conduct, means "meriting respect," possessing the qualities which deserve or command respect." A good reputation is only *primâ facie* evidence of the possession of qualities that deserve respect. It may exist in the absence of every such quality owing either to public ignorance or to a depraved state of public opinion. It is an abuse of the term, in my opinion, to apply it to the conduct of a business which deserves the disapproval of everyone who respects the law, and which only enjoys a good reputation because its real character has not been found out, or with persons who, as violators of the law, are themselves unworthy of respect. It has been argued that the parties to this contract probably intended to use the word in this improper sense. I hardly think so. It is not likely that the proprietor of a licensed house would employ a term usual in a contract of this kind, and necessary for the preservation of the license, in a sense that would allow the licensee, without breach of

the contract, to act in a way that might, and would, if the police did their duty, lead to a forfeiture of the licence. But if the parties had such an intention they have not plainly, or at all, expressed that intention in the contract, and in the absence of a clear expression of an improbable intention, this word ought, I think, to be construed according to its primary and plain meaning. "In all contracts where the meaning of language is to be determined by the Court, the governing principle must be to ascertain the intention of the parties from the words they have used." Per Cur., in *M'Connel v. Murphy*, L. R., 5 P. C. p. 218. And "words are to be construed according to their strict and primary acceptation unless from the context of the instrument they appear to be used in a different sense or unless in their strict sense they are incapable of being carried into effect." *Per Cur.*, in *Mallan v. May*, 13 M. & W., p. 517. It has been conclusively proved by the evidence in my opinion, that the lessee conducted the business of this hotel in a manner not respectable, and I think that the proprietor had a legal right upon this ground, whatever his motives may have been, to refuse to renew the lease. The appeal ought, therefore, in my opinien, to be allowed, with costs. As my learned brothers are of a contrary opinion, the appeal will be dismissed, with costs.

WILLIAMS, J. read the following judgment and also that of A'BECKETT J.—The question we have to decide in this case may be stated as follows:—Does the expression contained in the lease —"conduct the business in a respectable and business like manner"—necessarily mean conduct the business in a "legal' way? Did the parties to the lease mean that the lessee was not to get a renewal if he committed a breach of the Licensing Statute? If such be the case, then undoubtedly the decision of the primary judge is contrary to evidence, as there was abundant evidence that two of the provisions of the Licensing Statute had been broken by the lessee—(*a*) by upon one occasion permitting games at cards for money to be played in the licensed premises; (*b*) by supplying liquor upon several occasions, not habitually, on Sunday to customers who were not travellers. But if such be not the necessary construction, then there was equally abundant evidence that the lessee, apart from these breaches of the provisions of the Licensing Statute, had conducted the business in a respectable and business-like manner. As the word "respectable" may, according to the subject matter to which it relates, bear more than one meaning, we have to ascertain, for the purpose of construction, in what sense did the parties use the term. To enable us to do this, we may regard the subject matter of the lease, an hotel in a country district; the character of the parties to it—that of lessor and lessee; and the other qualifying adjective "business-like." The rules of construction, "that a document ought to receive that construction which will best effectuate the intention of the parties to be collected from the whole of the agreement, and that greater regard is to be had to clear intention of the parties than to any particular words which they may have used in the expression of their interest," are well established—*Ford v. Beech*, 11 Q.B., p. 866. So also is the rule that "the meaning of words and expressions must be construed with reference to the subject matter." So is the rule that a word or phrase may be construed in a secondary or peculiar meaning in subservience to the general intention, according to the maxim "*Verba intentioni debent inservire*," and so is the rule of *ejusdem generis*. Now, applying these undoubted rules of construction to the document under consideration, in what sense did the parties to this lease intend to use the word "respectable" in its connection with the conduct of the business of a country hotel? Though the existence of and the provisions of the Licensing Statute must have been present to the minds of both parties, they have abstained from using the word "legal," and have not, contrary to what is customary in leases of this character, made the slightest reference to the statute or any of its provisions. The omission to keep locked on Sunday any one door communicating with the bar is an offence against the statute, a breach of its provisions, and yet one can hardly suppose that the parties intended that if the lessee committed an isolated or even occasional acts of this description, he was to be held as having conducted his hotelkeeping business in a way that was not "respectable." The hotel had a good character as an hotel, and had a good business connection, and no doubt it was intended that the lessee should so conduct the business as not to damage its good character or its business connection with its customers and the outside public. What I think was in the lessor's mind was to preserve the custom and the business connection of the place, and to bind the lessee to do nothing that would give the house a bad name amongst those who were or might become its customers and frequenters. This is the view the learned primary judge adopted, and if we may look at the acts, admissions, and conduct of the plaintiff (the lessor), this was undoubtedly the construction he also placed upon the expression, "conduct the business in a respectable manner." If this be the right construction—as I think it is—then the question became one of fact for the primary judge as to whether the business had been conducted in a respectable manner; that is to say in such a manner as not to injure its good name or its business connection. The learned primary judge has found that a question of fact in favour of defendant, and there is abundant evidence to support his finding. Holding as he did, and I think rightly, that the parties did not intend to use the word "respectable" as necessarily including "legal" or an observance of all the provisions of the Licensing Statute, he came to the conclusion that the facts that the lessee allowed upon one occasion a game of cards for money to be played in a private parlour of the hotel, and supplied sober customers of the hotel with liquor upon several occasions on Sundays, would not, as against all the other evidence in the case, justify him in coming to the conclusion that the lessee had done anything to impair or blemish the good character, good name, or business connection of the place amongst those with

whom it was important that that good character, good name, and business connection should be maintained —namely, amongst the public. Had the evidence been that the lessee had supplied drunken persons with liquor, either on Sundays or on other days, or that he had permitted thieves or prostitutes to assemble in his licensed premises (offences against the Licensing Statute), the learned judge would no doubt have found otherwise than he did, not because these acts would be offences against the statute, but because they would be of a nature to damage the hotel's good name, good character, and business connection. For the reasons I have stated I think the finding of the learned judge amounted to a finding upon a question of fact, which there was evidence to support, and which consequently ought not to be disturbed. The appeal should, in my opinion be dismissed with costs.

A'Beckett, J.—In this case the learned primary judge has found as a fact that an hotel has been respectably conducted within the meaning of an agreement which provided for the renewal of a lease if the business should be conducted in a respectable and business-like manner. The question is whether this finding should be set aside on the ground that it was proved that the licensee of the hotel had on one occasion been fined for permitting gambling therein, and had on many occasions sold liquor contrary to the law against Sunday trading. Apart from these facts the evidence was all one way as to the respectability of the house. It would be contrary to the intention of the parties, as disclosed by the contract, to treat "respectable" as synonimous with "legal." If they had meant to stipulate that the business should be carried on in strict conformity with the licensing law, they would have said so. A covenant to this effect is common enough in hotel agreements. The construction which the Court has to put upon the word "respectable" ought not, in my opinion, to be affected by any low standard of respectability, which we may surmise would have satisfied the parties. The word must be given its ordinary meaning as applied to the subject matter of the contract. but unless it be held that any infraction of the licensing law, no matter of what nature, would necessarily be destructive of respectability, it becomes a question of fact whether the infractions of law proved in this case were compatible with the respectable carrying on of the business as a whole and whether evidence of general repute and proper carrying on of the trade was necessarily to go for nothing on proof of the particular instances in which the law had been disobeyed. This question of fact has been found in favor of the defendant. It was for the judge who heard the evidence, as it would have been for the jury had there been one, to decide it. As I cannot say that his finding is against evidence, I think the appeal should be dismissed with costs.

Appeal dismissed with costs; judgment for the defendant.

Solicitors for appellant, *Sabelberg & Little;* Solicitors for respondent, *Levinson.*

SUPREME COURT SITTINGS.

(Before Holroyd, J.)

Meadway v. Rhodes and anor.

Feb. 7, 13 Mar. 9.

Equitable Mortgage—Absence of stipulation as to interest—Right of Mortgagee to interest.

A policy of insurance was deposited by way of equitable mortgage in anticipation of a debt to be incurred by the mortgagor to the mortgagee.

Held, that when the debt arose the deposit operated and interest became payable although there was no express stipulation as to interest.

Action by Isabella Kezia Meadway against Hannah Rhodes and the Australian Mutual Provident Society.

Sir Bryan O'Loghlen appeared for the plaintiff; *Box* for the defendant Rhodes.

Mitchell (with him *Coldham*) for the defendant Society.

[The facts and arguments sufficienty appeared in the judgment.] C.A.V.

His Honor:—In 1879 Henry Meadway, the husband of the plaintiff effected an assurance on his own life in the sum of L500, the premium being payable half-yearly—L11 2s. 1., on the 2nd of January and the 2nd of July. The policy refers to a declaration of the assured as the basis of the assurance. It contains a proviso that the amount assured shall not become payable until one calendar month after proof of the age identity, and death of the assured shall be furnished to the satisfaction of the directors of the society; and further provisoes, to the effect that if the declaration shall be found to be untrue in any particular, the assurance shall be void, and the premiums paid be retained by the society, and that the assurance shall at all times be subject to the bye-laws of the society. The declaration states that the age of the declarant would be 49 next birthday, and that he was born at Chudleigh, in Devonshire, on the 9th of January 1831. On the 2nd of February, 1880, the policy was transferred to the defendant, Hannah Rhodes, by an endorsement in the statutory form, and the transfer was registered pursuant to the Act No. 474 on the 6th of the same month. Hannah Rhodes, on the 4th of February, signed a memorandum which was addressed to Henry Meadway, and contained these words—"I hereby notify that the policy of insurance on the life of Henry Meadway for L500, transferred by him to me, is held by me as security only for the sum of L100, being a promissory note for that amount signed by me; and I undertake upon payment of the said sum, and any amounts I may have to pay on said policy, to retransfer the said policy back to him." The statement of claim alleges, and it is admitted by the defence, that Hannah Rhodes endorsed Henry Meadway's promissory note for L100; but this is not quite accurate. Henry Meadway borrowed L100 from the London Discount and Mortgage Bank on the Security of a joint and several promissory note

made by himself, the defendant Rhodes, and two other persons, paying 10 per cent. interest in advance. He was to be allowed two years to repay the amount, paying interest and renewing the note every six months. The note was renewed several times, and ultimately the L100 was paid by the defendant Rhodes, at what date I do not exactly know. Henry Meadway died on the 13th of September last, having two days before his death executed a deed, whereby after reciting that the policy before mentioned had been assigned to Rhodes as security for certain moneys advanced by her and payments made in connection therewith, he purported to assign to his wife all his right to the said policy and all bonuses accrued thereon. The plaintiff seeks accounts of all sums due to defendant, Rhodes, by the deceased Henry Meadway in connection with the said policy, of all sums received by her from the defendant society, and of all sums due by the defendant society under the policy. The society offers to pay L331 8s. 3d. to the persons entitled as the court may decide. The account of the society is made up in this way :—The L500, with a reversionary bonus recently accrued, amounts to L563 18s., from which the society claims to deduct two sums of L121 15s. and L110 14s. 9d., leaving the balance of L331 8s. 3d. above mentioned. The right of the society to deduct the L121 15s. is not disputed. That is due for principal and interest in respect of a loan obtained from the society by Hannah Rhodes as transferee of the policy during Henry Meadway's lifetime. The deduction of L110 14s. 9d. is challenged on the pleadings, but was only partly contested in argument. In October 1884, the defendant Rhodes forwarded to the secretary of the society a certificate of the baptism of Henry Meadway purporting to be signed by the deacon of the Congregational Church at Chudleigh, in Devonshire, which showed that he was born on the 9th of January, 1824, and consequently that his age when he assured his life was 56 next birthday and not 49. as stated in his proposal. Rhodes supported the certificate by a declaration setting forth that she was desirous of having the age of the assured proved and admitted on the policy, but could get no assistance from him in the matter, and that she had received the certificate from the husband of his eldest sister in Chudleigh. The secretary wrote twice to Meadway on the subject, forwarded him a copy of the certificate and a form of declaration for him to fill up, but he took no notice of the secretary's letters, and his age was not admitted. The society has not been furnished by the plaintiff, or by the defendant Rhodes, or by anybody else with any other evidence of the true age of the assured. The plaintiff has not disputed the accuracy of the certificate. The society has not insisted on treating the policy as voided for misstatement of age in the proposal, nor refused to pay for insufficiency of proof of age ; but has offered to accept the certificate as sufficient proof, a certificate of birth being the proof usually accepted under the rules of the society, and to regard the misstatement as an innocent error, claiming only to be placed in the same position as if the truth had been stated in the first instance. In that event, an additional premium, at the rate of £7 17s. 6d. per annum, would have had to be paid for 10 years and a half, amounting to £82 13s. 9d. ; and the society seeks to add to this total interest at 5 per cent. on each additional sum which it ought to have received from the time when the same was properly payable. That would come to £28 7s. according to Mr. Maine's calculation. According to the bye-laws of the society, by which every member becomes bound on accepting a policy, the directors in cases of innocent error as to age may make such arrangements with a view to the correction of the error and its consequences as they may deem equitable. The arrangement offered by the society appears to me most equitable, and the rate of interest charged is very moderate. I allow the deduction ; and I must direct the plaintiff to pay the society's costs of this action. The defendant Rhodes would have agreed to the society's demand. The disputes between the plaintiff and the defendant Rhodes are more difficult of adjustment. Rhodes, it is clear, must replace the £121 15s, which the society retains on account of her debt. There is some confusion as to the rate of interest charged on renewal of the promissory note, and how often it was renewed, and on which renewals Mrs. Rhodes paid the interest. I have definite evidence that she paid £42 for interest in the whole before she paid the £100. She says that in addition to this she put her name to a bill to enable the plaintiff, who seems to have transacted a good deal of her husband's business, to borrow £9 from one Rosenwax towards payment of the interest on the first or second renewal and of a premium then becoming due on the policy, and that she herself paid that bill, with £3 for interest thereon, about three years ago. A receipt to Henry Meadway for the first half-yearly premium on the policy, which was paid before the policy was issued, was produced by the plaintiff. After that the premiums were paid by somebody down to the 29th of July, 1889. Rhodes says that for the next year after the money was borrowed they, meaning the Meadways, paid the premiums ; and that she paid all the others afterwards. The plaintiff produced another receipt for the half-year from the 2nd of Jan. 1881 to the 2nd of July, 1881, and did not assert that she or her husband paid any more. Upon this evidence I conclude that the defendant Rhodes made 17 half-yearly payments of premium, L188 15s. 5d. in all. On these payments she claims interest at 10 per cent. She also demands seven and a half years' interest on the L100 at 11 per cent., and one year and two months' interest on the same sum at 10 per cent.; together with the L12 paid to Rosenwax, with interest thereon for three years at 10 per cent. The plaintiff insists that Rhodes is not entitled to any interest, but can only charge her security with the L100 and the L188 15s. 5d., having expressly contracted to that effect by her memorandum of the 4th February, 1880. In order to apply the authorities which have been cited, it is necessary to examine the position of the parties as the evidence presents it to my mind. It was not intended that Rhodes should pay the interest

on renewal of the promissory note, nor apparently did she expect that Meadway would be unable to do so; but she anticipated that she might be called upon to satisfy the principle of the loan out of her own pocket, and against that contingency she took security. She also contemplated the possibility of having to keep the policy alive for her own reimbursement, and desired to be recouped for what she might so expend. As she was under no obligation to get the promissory note renewed, I think that the sums which she provided from time to time for that purpose were voluntary advances for which Meadway's estate is indebted to her, although from lapse of time it may be difficult or impossible now to recover the debt, but which are not chargeable against the policy. On the other hand, in respect of Meadway's debt to the bank, the relation of principal and surety subsisted between him and Rhodes, and he was bound in equity to idemnify her against payment of the L100. Being unwilling to go on making him advances for renewal of the note, she at last paid the amount; and from that time I think interest began to accrue in her favour, as on money improperly detained from her (*Craven v. Tickell*, 1 Ves, p. 60). It is on the same principle that under a written contract for a sum of money payable on demand, or at a day, certain interest is allowed in equity as at law from the time of demand or from the fixed period of payment (*Lowndes v. Collens*, 17 Ves., 27). The interest due to Rhodes would be covered by her security unless she had unequivocally contracted to the contrary. Sir Bryan O'Loghlen relied mainly upon the case of *Thompson v. Drew* (20 Beav., 49), to which I referred during the argument. There, a mortgagee covenanted to reconvey the mortgaged premises on payment of the amount of the debt at any time before the premises were sold, and the Master of the Rolls held that the debt did not carry interest. But that was a very peculiar case. The mortgage was a legal one by deed, and such a mortgage, if drawn by a competent person invariably contains a covenant for the payment of interest, when it is intended that interest should be payable. The deed contained a covenant to pay the principal only. The amount was very small, only L33 payable by quarterly instalments of L5 each, with a power for the mortgagee in case of default to sell after three months' notice, and pay himself the L33, and hold the residue of the proceeds in trust for the mortgagor. The intention seemed plainly expressed that the deed should not carry interest. Rhodes became absolute owner of the policy at law; but by her memorandum acknowledged herself to be in equity a mortgagee. In my opinion the memorandum which is quite informal, and was not prepared by a solicitor, was intended only to define her real position, and not to exclude her right to interest in the event of her being compelled to pay the L100. She had lent nothing but her name when the memorandum was signed, and interest might never have accrued. It was held in *Carey v. Doyne* (5 Ir. Ch., R., 104) that, if deeds are deposited by way of equitable mortgage to secure a simple contract debt, the debt bears interest from the date of the deposit, and by reason of it, though there be no express contract that it should bear interest. (see also *in re* Kerr's policy, L.R., 8 Eq., 331). That which is the rule on the deposit of title deeds must be the rule on the deposit of a policy of insurance. The policy was deposited with the defendant Rhodes in anticipation of a debt to be incurred by Henry Meadway to her, and when the debt arose the deposit operated, so to speak, and interest commenced. No question has been raised by the pleadings or before me in argument upon what we still familiarly call the Statute of Limitations. The form of Rhodes' defence invited it, if it was intended that any such question should be raised; and I shall, therefore, allow interest on the principal sum of L100 from the time when it was actually paid by her. By parity of reasoning I must allow interest on each premium which she has paid for the purpose of keeping the insurance alive, and such interest must be considered as accruing from the date of each payment. I do not wish to put the parties to the expense of a reference, and I shall permit the date of payment of the L100 and the calculation of interest to be verified by affidavit. Interest must be calculated at 8 per cent. up to the 1st July, 1884, when the Judicature Act 1883 came into operation, and afterwards at 6 per cent. up to the consideration of further direction, which I shall reserve until 14 days from this date. The plaintiff must pay the costs of the action incurred by the defendant Rhodes up to Judgment. Rhodes may have claimed something more than I think she is entitled to charge upon her security; but she has not been guilty of any misconduct. The difficulty of determining what is due to her has not been occasioned by her. The following are the minutes of my judgment order:—That the defendant, The Australian Mutual Provident Society do within one week from this date pay into Court to the credit of this action the sum of L331 8s. 3d., and declare that the said sum is in full satisfaction of the policy of insurance in the pleadings mentioned and of all bonuses accrued thereon. Declare that the defendant Hannah Rhodes is liable to account for the sum of L121 15s., retained by the said society out of the sum insured by the said policy in respect of the loan obtained by her from the said society, and interest thereon, and that the said sum of L121 15s. ought to be deducted from the amount due to the said Hannah Rhodes upon the security of the said policy. Declare that the amount so due to the said defendant includes the principal sums of L100 paid by the said defendant to the London Discount and Mortgage Bank, in the pleadings named, and of L188 15s. 5d., being the amount of 17 half yearly premiums paid by the said defendant upon the said policy, together with interest on the said sum of L100, and on each of the said half-yearly premiums from the dates of payment of the same respectively, and declare that such interest ought to be calculated at the rate of 8 per cent. up to the 1st July, 1884, and from that date at the rate of 6 per cent. Order that the defendant Hannah Rhodes

be at liberty to file an affidavit or affidavits showing the date of her payment of the said sum of £100, and the dates of her payments of the said 17 half-yearly premiums respectively, and the amount of interest accrued on the said sums respectively, pursuant to the previous declarations, copies of such affidavit or affidavits to be delivered to the plaintiff's solicitor within 10 days, and that the plaintiff be at liberty, if she thinks fit, to file answering affidavits. Order that the plaintiff do pay costs of defendants respectively up to and inclusive of the hearing, and refer to tax such costs. Reserve the consideration of further directions and of future costs until 14 days from this date. Liberty to apply.

Solicitors: *A. R. Daly* for plaintiff; *Klingender and Co.* for defendant Rhodes; *Attenborough and Co* for defendant Society.

IN CHAMBERS.

(Before Webb J.)

17th. & 29th. April

CAIRNS v. WALSH:—VICTORIAN RAILWAYS COMMISSIONERS [Garnishees].

Rules of Supreme Court, 1884, *Order XLV r.* 1—*Insolvency Statute* 1871 (*No.* 379) *s.* 65 (4) (5)—*Garnishee Order nisi—Insolvency of judgment debtor*—*A judgment creditor who has obtained a garnishee order nisi is entitled to the attached debt as against the trustee in insolvency of the judgment debtor where the insolvency has been subsequent to the garnishee order nisi.*

Garnishee order *nisi*.

The facts and arguments appear sufficiently from the judgment.

Mr. Agg, for the Execution Creditors.

Mr. Snowball, for the Trustee in Insolvency.

Crown Solicitor, for the Garnishees.

HIS HONOR said: I will consider the matter.

HIS HONOR on a subsequent day read the following judgment:—The question to be determined in this case is whether a judgment creditor who has obtained a garnishee order *nisi* is entitled to have that order made absolute when the judgment debtor has become insolvent since the order *nisi* was obtained. This application first came before my brother Hodges, who directed notice of it to be served upon the trustee in insolvency of the judgment debtor. He now appears, and I have had the advantage of having the case argued on behalf of the judgment creditors and the trustee respectively, the garnishees being willing to pay either as the Court may direct. The cases upon the point appear at first sight somewhat conflicting; but upon a careful examination of them it will be found that they are quite reconcilable. In *Holmes v. Tutton*, 5 E and B., 65, it was held that a judgment creditor having served a garnishee order *nisi* was in the position of a "secured creditor" within the meaning of section 184 of the Bankruptcy Act 1849, the act then in force, but that he had not a "mortgage or lien" within the exception in that section, and, therefore could not enforce his security after the bankruptcy of the judgment debtor, but was only entitled to a dividend. That case was followed by *Tilbury v. Brown*, 30 L.J. (Q.B.), 46. There after a garnishee order absolute but before payment, the judgment debtor became bankrupt, and it was held that the assignee in bankruptcy was entitled to the money for the benefit of all creditors upon the same ground as already laid down in *Holmes v. Tutton*. In *Wood v. Dunn*, L.R. 2, Q. B. 73, the defendant, before notice of a deed of assignment by the judgment debtor, registered under the Bankruptcy Act 1849, paid the judgment creditor under a garnishee order absolute. The trustee sued the garnishee to recover the money, but it was held that the garnishee was protected as having made the payment in obedience to the order of a competent authority and that the proper party to be sued was the judgment creditor who had received the money and not the garnishee who had paid it. In giving judgment Channell, B. says, "If the present defendants had had notice of the trust deed at the time, or after the *ex parte* order of attachment was served upon them, and before the time for showing cause they would have had good cause to show and the order for payment would not have been made." And this observation has been cited to me as an authority for my refusing to make the order absolute in this case. But it will be observed that all those cases were decided upon the express words of the Bankruptcy Act 1849, section 184. That act having been repealed the subsequent act of 1869, section 16, sub-section 5, inserted the word "charge" in the definition of a secured creditor, the only words in the exception in section 184 of the former act having been "mortgage or lien," and it was held in *Emanuel v. Bridyer*, L. R. 9, Q.B. 286, that having regard to this word "charge," a judgment creditor having obtained a garnishee order was a "secured creditor" within the meaning of section 16, sub-section 5, and was absolutely entitled to the attached debt as against the trustee of the judgment debtor, who had become bankrupt subsequent to the garnishee order. Subsequently in *exparte Joselyn*, 8 Ch. D., 327, it was held, following *Emanuel v. Bridyer*, that a judgment creditor, having obtained a garnishee order before the filing of a liquidation petition by the judgment debtor, was entitled to the attached debts as against the trustee in liquidation, even although they did not become actually payable until after the commencement of the liquidation. Our Insolvency Statute 1871, which is drawn upon the lines of the English Bankruptcy Act 1869, contains no provision similar to the exception in section 184 of the English Bankruptcy Act 1849. Therefore the cases decided upon that section have no application here, except in so far as they establish that a judgment creditor having obtained a garnishee order is a secured creditor. The later cases decided on the Bankruptcy Act 1869, however, apply here as

sect on 16, sub-sections 4 and 5, of that act, on which those cases were decided, are identical with our Insolvency Statute 1871 sec. 65 subsections 4 and 5. I should therefore, apart from express authority in this Court hold that a judgment creditor here who has obtained a garnishee order is entitled to the attached debt as against the trustee in insolvency of the judgment debtor where the insolvency has been subsequent to the garnishee order *nisi*. But this case is not without authority in this Court, for in *Watson v. Morrow*. 6 V.L.R., L. 134, it was expressly held upon the authority of *Emanuel v. Bridger* and *exparte Joselyn*, that a judgment creditor who has obtained a garnishee order is as soon as the attachment issues in the position of a secured creditor, and as such is entitled to be paid. I therefore, now decide in favour of the judgment creditor. The garnishees do not ask for costs, and the order will be that they pay to the judgment creditors the sum of £239 17s. 3d., admitted by them to be due from them to the judgment debtor. The trustee of the judgment debtor has failed in his contention, and I order him to pay the judgment creditors their cost of this application. Refer to tax. Certify for counsel.

Solicitors for Execution Creditor *Brahe* and *Gair*; for Trustees in Insolvency, *Briggs* and *Snowball*; for Garnishees, *Crown Solicitor*.

(Before Hood, J.)

DULON v. ROBERTS: ROBERTS [claimant.]

5th & 6th May.

Rules of Supreme Court 1884, *Order LVII r.* 1—*Married Woman's Property Act* 1884 (*No.* 828) *s.s.* 4 (1), 8, 13—*Interpleader—Claim by wife of judgment debtor of goods alleged to be purchased by her with money given to her by the judgment debtor—Proof of claim.*

Sheriff's interpleader.

The facts appear sufficiently from the judgment.

The claimant in person.

Mr. Anderson for the execution creditor.

HIS HONOR said.—I will consider the matter.

HIS HONOR on the following day read the following judgment:—This is an interpleader to determine a claim to a piano and sewing machine seized under an execution against the defendant and claimed by the defendant's wife. Her claim to the sewing machine is admitted and the only question left is as to the piano. Mrs. Roberts was married in 1880, and has been living with her husband and not carrying on any separate business. In 1885 and 1886 they took a lodger who paid them £4 10s a month. This money Mrs. Roberts collected by her husband's permission and then handed it to him to keep for her, and when it had accumulated to £35 she bought a piano in her own name paying that amount as a deposit and the balance out of the receipts from the lodger. Assuming this to have been a gift by the husband to the wife either of the piano or of the money, I should say that by virtue of sec. 4 sub-sec 1 and sec. 8 of "*The Married Woman's Property Act* 1884" the property would be hers as against him. Even then, however, as against creditors such a gift would be of no avail, for I think the facts would bring this case directly within the latter part of sec. 13 of the same Act. It is that nothing in the Act contained shall give validity as against creditors to any gift by a husband to his wife of any property which after such gift shall continue to be in the order and disposition or reputed ownership of the husband, or to any deposit or other investment of moneys of the husband made by or in the name of the wife in fraud of his creditors. But I am against the claimant upon another view. She has to satisfy me that her husband did really make her a gift of either the money or the piano so as to deprive himself and his creditors of all claim thereto. She has, however, called no corroborative evidence, she was the only witness, and she has not even sworn that her husband in any way ever recognised her right to this piano, or ever actually gave it to her, or ever stated that the money with which it was purchased was to be hers absolutely. It has been in his possession ever since it was bought under such circumstances, that the outside world would naturally believe it to be his, and her claim is only put forward or made public after seizure by the sheriff. In such a state of facts, though this may be a hard case, I cannot say that I am satisfied upon her unsupported testimony, for I think that as against creditors there ought to be the strictest and clearest proof where a wife claims as hers property ostensibly the husband's. The claim therefore will be barred as to the piano and allowed as to the sewing machine, but as the claimant has succeeded in part and is also a married woman, there will be no costs either to her or against her. The sheriff must be paid by the plaintiff, and I fix his costs at £2 2s. Certify for counsel. I would add that the claimant appearing in person has presented her case on the facts in a very meagre fashion, and that the absence of evidence may have arisen more from want of knowledge of its necessity than from any difficulty in procuring it. I can, however, only deal with the facts as they are presented to me.

Solicitor for the execution creditor, *F. E. Fay*.

IN BANCO.

(Before Higinbotham, C.J., Holroyd and Hood, J.J.)

BROOKS ROBINSON AND CO. v. HOWARD SMITH AND SONS.

19 March.

County Court Statute 1869—*Jurisdiction of County Court—Bill of lading—Construction—To give the County Court jurisdiction the whole cause of action must arise in the colony.*

Crook v. Smith 4 V.L.R. followed.

Special case stated by the County Court Judge.

The action in the County Court was for damages for not delivering as per agreement a cargo of plate

glass which the defendants undertook to convey from Sydney to Melbourne and for as being bailees for reward of certain cases of plate glass the defendants so negligently and wrongfully managed the same that part thereof became broken. It appeared from the special case that the plaintiffs shipped certain cases of plate glass on the defendants' steamer Koonoowarra at Sydney for Melbourne and paid an extra freight for carriage on account of the fragile nature of the goods. When the steamer arrived in Melbourne and after the cases had been released from the steamer's tackle they were transmitted from the ships' side to a certain part of the wharf by the defendants' servants by means of rollers. One case when being taken off the rollers canted against a cedar log and was broken. His Honor found as a fact this injury was caused by the negligence of the defendants' servants. The plaintiffs claimed the loss occasioned by this injury and the defendants contended that they were exempt from all liability under the terms of the bill of lading. The material conditions in the bill of lading were as follows :—"The Company shall not be liable for damages . . . by breakage of glass . . . or any other goods of a fragile nature from whatsoever cause . . . nor for the loss of any property of special value unless shipped under its proper title or name and value and description of contents of package declared and extra freight paid thereon prior to shipment."—"The goods to be taken from the ship by the consignees immediately on arrival and without notice or they may be carried on at the master's option or transhipped landed or warehoused at the expense and cost of the owners of the same."—"All liability of the Company in respect of goods specie bullion or any cargo of special value is to cease as soon as they are free from the ship's tackle after which the Company is not to be responsible for any loss or damage however caused." His Honor submitted the following question to the Full Court." Notwithstanding the defendants' negligence in landing the plaintiffs' goods after they have left the steamer's tackle and being glass does the bill of lading exempt them from liability."

Bryant for the plaintiff. Stated the facts (Hood J. Had the County Court jurisdiction to hear this case.) Yes. The breach of contract arose in Victoria and the parties reside here. He cited *Vaughan v. Weldon*, L.R., 10 C P. 47. *Jackson v. Spittall* L.R. 5 C.P. 542. *Read v. Brown* 22 Q.B.D, 128 (Hood, J. In *Crook v. Smith* 4 V.L.R. 95 it was held that to give jurisdiction to the County Court the cause of action must arise within the jurisdiction. It was decided on the ground that the County Court was an inferior court.) There was a contract and breach within the jurisdiction apart from the Bill of Lading. When the goods were delivered on the wharf the original contract was completed and what we claim now is damages for breach of an implied new contract after delivery.

Dr. Madden with him *Duffy* for the defendant.

If the bill of lading applies the plaintiffs have no case. It provides that the goods are to be delivered and the consignees are to be ready to receive them. If not the Company has power to warehouse the goods at the consignees expense and risk. The word "risk" gives the defendants more than their Common Law power and shows that the bill of lading applies till the goods are warehoused if the consignee is not there to receive them. On the question of jurisdiction he cited *Buckley v. Hann*, 5 Ex. 43.

Bryant in reply cited *Stanton v. Davis*, 6 Leach Mod. Rep. 223.

Per Curiam. We answer the question submitted to us by the learned judge that notwithstanding the defendant's negligence in landing the plaintiff's goods after they had left the steamer's tackle, they were exempt from liability. It is fortunate that the ordinary dealings in daily life in transactions of this kind are usually transacted by either party without reference to the terms of the contract. It is not necessary in the great majority of cases to construe the effect of the terms of an instrument like this which, like a great many others of the same kind in recent times, contains provisions which appear to be wholly unreasonable. The answer to this is that they are terms which the parties agreed to, and to which they must submit when they come to litigation. The plaintiffs in this case have made two claims against the defendants. The first is for not delivering to them as per agreement a cargo of plate-glass, which they undertook to carry from Sydney to Melbourne. That claim, on the face of it, appears to be one which the County Court could not entertain. The County Court has no jurisdiction to entertain it, for a part of the cause of action arose outside Victoria. The case of *Crook v. Smith*, 4 V.L.R., L. 95, establishes the rule that an action cannot be brought in the County Court unless the whole cause of action arises in Victoria. In this case the contract was made and the carriage of the goods began outside the colony. The plaintiffs then relied on a second cause of action, for that the defendants being bailees for reward of certain cases of plate glass of the plaintiffs' so negligently and wrongfully managed the same that part thereof became broken and loss to the plaintiffs. The goods were plate glass. They appear to have been brought under the provision in this bill of lading relating to property of special value. The bill of lading provides that as to articles of special value there should be no liability for their loss unless there had been a declaration of their name, value, and description of their contents, and extra freight paid. It appears that the extra freight was paid in this case. But there is a subsequent provision in the bill of lading that all liability of the company in respect of the carriage of any articles of special value should cease as soon as they were released from the steamer's tackle, after which the company was not responsible for loss or damage however caused. By another provision of the bill of lading the consignee was to take the goods from the ship immediately on its arrival, although he had received no notice, and if he did not do so the goods might be carried at the master's option, transhipped, landed, or warehoused at the expense and risk of the owners of the same. That provision carries powers

at the master's option as to the time and place of delivery under the contract to the owner of the goods. At the same time it saves the shipowner from all claims for liability in respect of the acts done after the time and place of delivery. Another provision is that during the whole currency of the bill of lading the shipowner was free from liability for any act or neglect or default of the persons in the service of the company. Whether these provisions are reasonable or not was a matter to be judged of by business men in the requirements of the trade. In this case the plaintiff has accepted the conditions, and the conditions apply to the circumstances under which the damage was caused by the negligence of the defendants' servants. Accordingly the Court answers the question reserved, that the bill of lading did exempt the defendants from liability notwithstanding the negligence of the defendants in landing the plaintiffs' goods, and notwithstanding that the goods were glass. The defendants having succeeded they are entitled to the costs of and occasioned by the hearing of the special case.

Question reserved, answered in favour of the defendants with costs.

Solicitor for plaintiffs, *Gillott*; solicitor for defendants, *Johnson*.

(Before Higinbotham C.J., Holroyd and Hood J.J.)

WARBURTON v. ALTSON.

10th March.

Practice—Supreme Court—Appeal from trial before a judge without a jury—Verdict against evidence—Question of fact—Where there are conflicting probabilities which render it a question whether the judge might not have unreasonably come to the conclusion at which he arrived his verdict will not be disturbed.

The facts sufficiently appear in the judgment.

Higgins (with him *Dr. Madden and Cussen*) for appellant.

This verdict ought not to stand, it is against the weight of evidence, the oral testimony is contradictory, but all the documentary evidence is in favor of the plaintiff. In such cases if the judge decides against the weight of documentary evidence, as he has done here, this court will interfere. (*The Australasian Steam Navigation Co.* v. *William Howard Smith & Sons*, L.R. 14 Ap. Ca. 321, *Owston* v. *Mullen*, 4 W. W. A'B. (L) 36, *Treen* v. *Cameron*, 5 A.J.R. 32, *Stephens* v. *Shire of Belfast*, 5 A.J.R, 79)

Topp (with him *Mitchell and Weigall*) for respondent.

This court will not disturb the finding of the court below, unless the verdict was one which a jury, viewing the whole of the evidence reasonably, could not properly find. There must be such a preponderance of evidence, assuming there is evidence on both sides to go to the jury, as to make it unreasonable and almost perverse that the jury, instructed and assisted properly by the judge, should return such a verdict. The onus lies upon the appellant to establish that the verdict is unreasonable and unjust. If reasonable men *might* find the verdict which has been found, this court has no jurisdiction to disturb a decision of fact, (*Solomon* v. *Bitton*, 8 Q.B.D. 176, *Webster* v. *Friedberg*, 17 Q.B.D. 736, *Praed* v. *Graham*, 24 Q.B.D. 53, *Metropolitan Railway Co.* v. *Mary Ann Wright*, L.R. 11 Ap. Ca. 152.)

C.A.V.

17th March.

HIGINBOTHAM, C.J.—This is an appeal from a judgment of his Honor Mr. Justice Williams involving a finding on two distinct questions of fact. The action was brought to obtain a declaration that the defendant Altson is a trustee for the plaintiff of four pieces of land described in the schedule to the statement of claim, on account of moneys or securities received by Altson in respect of part of the land, and an order to convey the residue to the plaintiff. The plaintiff's claim rested on an indenture dated January 26, 1874, whereby Altson agreed to deliver to the plaintiff the certificate of title of certain lands, including the lands in respect of which the action was brought, and a declaration by him that he held the land as a trustee for the plaintiff. The defendant Altson in his defence set up an earlier agreement in writing dated September 18, 1871, between the defendant and Thomas Warburton, the husband of the plaintiff, for advances of money to him by Warburton on certain terms to Altson to enable the latter to carry on the business of a bill discounter and money lender; the continued acting on that agreement by and between the plaintiff, the sole legatee and executrix of her husband and Altson; and an arrangement made in the course of the transactions under that agreement, whereby a portion of the land alleged to be then held on the joint account of the plaintiff and the defendant in the name of Thomas Warburton should be transferred into the defendant's name, and a declaration of trust of the same and of the remaining portions of the lands alleged to be then held in defendant's name on a like joint account, should be executed by the defendant in favor of the plaintiff as security to her. The first issue of fact, therefore, shortly put, was whether the declaration of trust was or was not merely executed as security to the plaintiff. The question whether evidence was admissible for the defendant to contradict or to vary the terms of the declaration of trust was raised in the court below, and was determined by the judge in favor of the defendant. Assuming such evidence to be admissible and the finding on the issue of fact to be in favor of the defendant and to be upheld, a further question would present itself—whether such finding would be a legal and complete answer to the plaintiff's claim. The learned Judge found in favor of the defendant on the first issue; and, in view of the opinion at which we have arrived as to the second part of the case, it is not necessary that we should give judgment upon the appeal from this finding of fact or on the questions of law in connection with the first ground of defence. The defendant Altson raised as a second and distinct

ground of defence an agreement alleged to have been made between him and the plaintiff about the month of August, 1877, when their joint dealings under the agreement of September 18, 1871, were wound up, whereby it was arranged that the defendant should re-convey to the plaintiff some of the lands comprised in the declaration of trust, and that other lands comprised in the declaration, including those mentioned in the schedule of the statement of claim, should belong to the defendant for himself. The plaintiff and her witnesses admitted that it was agreed in 1877 that the agreement of September, 1871, should be terminated, but the terms of settlement stated in the 12th paragraph of the defence were positively denied by them. The learned judge found this issue also in favor of the defendant, and we are not prepared to reverse his finding. The oral evidence given in this case was highly unsatisfactory. The conflicting testimony of the plaintiff and the defendant Altson was discredited by the admission which each was compelled to make that in the course of litigation they had each sworn a false answer at variance with the sworn evidence given in this suit by each of them, apparently with the object of defeating an adverse litigant by deliberate false-swearing. The degree of discredit attaching to the one or to the other could best be weighed by the judge who heard them both examined and cross-examined on this and the other incidents of their respective cases. There was further evidence, oral and documentary, and there were conflicting probabilities bearing on the second issue which rendered it a question on which the judge, understanding and appreciating the whole of the evidence on both sides, might not unreasonably come to the conclusion at which he arrived. Applying the salutary rule by which courts of law are governed in dealing with findings of the Court below on questions of fact, we refuse to disturb the finding on the second issue or the judgment founded upon it. The appeal will be dismissed with costs.

Appeal dismissed with costs.

Solicitor for appellant, J. Madden; solicitor for respondent, Phillips.

(Before Higinbotham C.J., Holroyd and Hood, J.J.)

THE CENTENNIAL LAND BANK v. EXLEY.

20th March.

Bill of Sale—Instruments and Securities Statute 1864, *sec* 57—*A bill of sale with a condition for payment within a certain time after demand is not rendered void under this section by its being proved that no definite time was fixed for payment.*—

Semble per Hood, J., to have a bill of sale declared void under this section it must be proved that it was given subject to some condition for payment not contained in the conditions appearing in the body of the bill.

Appeal from an order by the County Court Judge in the County Court, Melbourne, on an interpleader summons.

The plaintiffs having recovered judgment against the defendant for a certain sum in the County Court seized certain goods in execution. Maria Exley, the defendant's wife claimed the goods under a bill of sale from the defendant. The matter came before the County Court Judge on an interpleader summons when the claimant produced the bill of sale on which she relied.

The proviso for redemption was as follows:—"Provided . . . . if the mortgagor . . . shall pay to the mortgagee . . . all moneys due . . . . within one hour after demand has been made in writing by or on behalf of the mortgagee . . . . one week's notice in writing of such demand being served on the mortgagor . . . . then the mortgagee will . . . reassign the said chattels, &c." The claimant in cross-examination admitted that there was no time fixed for the repayment of the moneys advanced on the bill of sale. The learned Judge therefore held the bill of sale void under sec. 57 of Act 204 inasmuch as it was given subject to a defeasance or condition not contained in the body thereof, to wit, that the money secured by the bill of sale is stated to be repayable on demand, while it appeared by the evidence that there was no definite time fixed for payment.

The claim was barred and the claimant now appealed from this order.

McArthur for the appellant.—The evidence shows no variance between the ageeement between the parties and the conditions in the bill of sale. (*Hood, J.*— The learned Judge seems to have decided that money lent for an indefinite time is not repayable on demand. That is clearly wrong). The case of *Anthoness v. Anderson*, 14 V. L.R. 127 relied on in the Court below is not in point.

Isaacs for the respondent.—The decision of the County Court Judge was right, even if his statement of the law went too far. In the proviso for redemption in the bill of sale the money is payable one hour after demand, one week's notice in writing of such demand to be served on the mortgagor. (*The Chief Justice.*—That is consistent with the claimant's evidence for there is no fixed time of payment). Money payable on demand is different from money payable at a fixed time after demand: *Norton v. Elms* 2 M. & W. 461. (Hood, J.—Under this section must it not be proved that the bill of sale was given subject to a condition not appearing in the body of the bill? The claimant's evidence only shows that she did not state one of the conditions appearing in the bill).

Per Curiam. We think in this case that there has been no condition proved to have been agreed on between the parties which is not contained in the bill of sale and therefore the judgment of the court below must be reversed.

Appeal allowed with costs. Claim allowed with costs.

Solicitors for plaintiff, *Braham and Pirani*; for Claimant, *Weigall and Dobson.*

SUPREME COURT SITTINGS.

(Before Hood J.)

JONES v. REED.

April 22, 25.

Foreign Judgment—Local Court — Action —"The Intercolonial Debts Act, 1887," (*No.* 959) *s.s.* 1, 3, 7, 9—"*County Court Statute*, 1869" (*No.* 345) *s.* 93.

A party is only bound to follow a remedy provided by statute when his right also is created by statute; where he has a common law right, any further remedy provided by statute is cumulative.

Prima facie, an action lies on the judgment of every court of competent jurisdiction.

Motion by Samuel Herbert Jones against Sydney Herbert Reed to recover the sum of L49 1s. 4d.; this sum was made up of two items, viz.: L36 10s. 6d. being the amount recovered by the plaintiff against the defendant under a judgment of the Metropolitan Suburban and Hunter District Court, in New South Wales, dated the 22nd February, 1886, and L12 10s. 10d., amount of costs recovered by the plaintiff against the defendant under the said judgment. By his defence the defendant stated that the Metropolitan Suburban and Hunter District Court in New South Wales was a Court of inferior jurisdiction and that no action lies in this court upon such judgment; that the said Metropolitan Suburban and Hunter District Court had no jurisdiction to try the cause of action in respect of which the judgment sued on had been obtained; that the Governor of the Colony of Victoria before this action was brought, by Order in Council, declared that the provisions of the Act 51 Vic. 959 (*The Intercolonial Debts Act*, 1887) should apply to the judgments of the Metropolitan Suburban and Hunter District Court in New South Wales. There was also a set off. At the trial the only defence relied on was that the action could not be maintained since the passing of Act 959 inasmuch as a mode of enforcing judgments of local courts of the other colonies had been provided by that act, which mode the plaintiff was bound to adopt to the exclusion of his remedy by action.

Goldsmith (with him *Agg*), for the plaintiff, opened the case.

Skinner, for the defendant.—The plaintiff should have proceeded under Act 959; that act provides that on registering a judgment of a local court of New South Wales execution may issue; where the legislature provides a special remedy, that remedy should be applied for. Act 949 is retrospective being an act regulating procedure. Moreover, it is not possible to sue in the Supreme Court on a judgment obtained in a court of inferior jurisdiction, *Berkeley* v. *Elderkin*, (1 E. & B. 805) and *Schibsby* v *Westenholy*, (L.R. 6 Q.B. 155) were cited.

Agg in reply; Act No. 959 does not abolish any previously existing remedy the plaintiff might possess; the remedy given by it is cumulative. The judgment was obtained by the plaintiff prior to the passing of Act No. 959, and there is some doubt as to whether that act is retrospective, it not being in terms retrospective and affecting vested rights It is possible to sue in the Supreme Court upon a foreign judgment and get a garnishee order whereas under Act No. 959 the only remedy is execution, *Johnson* v. *Dickson*, (1 V.R. (L) 159). The principle upon which a foreign judgment is enforceable is the principle of implied contract; *Grant* v. *Easton* (13 Q.B.D. 302: *Rousillon* v. *Rousillon* (14 C.D. 370); the reasoning in these cases applies equally to judgments of an inferior or superior court.

Cur: ad: vult.

HIS HONOR:—The only question arising for determination is this case is whether an action can be maintained in this court upon a judgment of a local court of New South Wales. The plaintiff in 1886, obtained judgment against the defendant for £49 1s. 4d., being the amount of a promissory note and costs in the Metropolitan, Suburban and Hunter District Court, a local court of the colony of New South Wales and the defendant being now in this colony he is sued upon that judgment. In his defence the defendant raised several points, but the only one relied on was that such an action cannot be maintained in this court since the passing of the Intercolonial Debts Act 1887, No 959, inasmuch as a mode of enforcing judgments of local courts of the other colonies has been provided by that act, which it was contended the plaintiff was bound to follow to the exclusion of his remedy by action. The heading to the Intercolonial Debts Act 1887 is as follows:—"An act to facilitate the recovery of judgments against debtors who have removed into adjacent colonies, and the enforcement of judgments obtained in adjacent colonies against debtors who have removed from such colonies into Victoria." It then by section 3, provides that the Governor may, by Order in Council, declare that the provisions of the act shall apply to the judgments of the local courts of certain colonies, and in sections 7 and 9 a mode is provided for entering up judgment in the County Court in Victoria upon a certificate of the judgment of such local courts, and thereupon such judgment of the local court 'shall be deemed to be a judgment of such County Court, and shall have the same force and effect as if such judgment had been obtained in such County Court, and the like proceeding may be had and taken upon and under the same accordingly." By sec. 1 of Act No 959 it is enacted that that act shall be read with the County Court Statute 1869. Counsel for defendant in this case admits that prior to this act he would have had no defence to the present action; but he contends that the defendant should not be harrassed by unnecessary litigation, and that the plaintiff must now proceed by execution under the new remedy created by statute and is deprived his previously existing course of action. It was first argued that, this being a statutory remedy the plaintiff was bound to pursue that remedy, and several cases in this court were cited with regard to

cumulative proceedings by way of prohibition. I do not think that these cases apply. A party is only bound to follow a remedy provided by statute when his right is also created by statute see (*Wolverhampton Waterworks Co. v. Hawkesford*, 28 L.R., C.P. 242, per Wiles, J.); but where he has a common law right and a common law remedy, any further remedy provided by statute is cumulative (*Ibid*). It was then contended that the Act No. 959, together with the County Court Statute 1869, indicated an intention by the Legislature that no such action as this should be allowed. In support of this view reliance was placed upon the case of *Berkeley v. Elderkin* (1 El. and Bl., 805), where it was held that an action could not be maintained in the Court of Queen's Bench upon a judgment of a county court created by the 9 and 10 Vict., c. 95, but that the plaintiff must enforce his judgment by execution in the manner prescribed by that particular statute. The reason for that decision was that the court was satisfied that the intention of the legislature, as expressed in that statute, was to confine the remedy on the judgments of courts constituted under that act to the remedies specifically provided in the Act. But it was expressly stated in the course of that case, and in the judgments that *prima facie*, an action lies on the judgment of every court of competent jurisdiction. Such a judgment creates in the defendant a duty to pay, and the courts will enforce that duty unless it appears that the legislature has expressly or impliedly taken away the remedy by action (see 1 El. and Bl., at p. 807; *Schibsby v. Westenholy*, L.R., 6 Q.B., at page 159; *Rousillon v. Rousillon*, 14 Ch. D., at p. 370-371). The defendant therefore, in order to succeed, has to show that either by Act No. 959, or by the County Court Statute 1869, the Legislature intended to prevent actions being brought in the Supreme Court upon judgments of foreign local courts. Even if Act No. 959 would be construed to extend to previously existing judgments, which is a point open to much argument, yet there is nothing in it that I can see to indicate any such intention as that such suggested by the defendant. The very title, "an Act to facilitate," &c., shows that the object was to assist creditors and to give them an easier and more expeditious remedy rather than to deprive them of any that they then possessed. The reference to the County Court Statute 1869, however, raises more difficulty. In the case relied upon of *Berkeley v. Elderkin* it was pointed out that if a plaintiff could sue in the superior Court upon the County Court judgment, he would be able to issue execution in a mode and to an extent entirely different from that provided by the County Court Act 9 and 10 Vic., c. 95, which contained certain special provisions for the protection of debtors from execution. But any argument that might be founded upon any similar protection in the County Court Statute, 1869, is met, in my opinion, by section 93 of that Act, whereby a County Court judgment may be removed into the Supreme Court and execution issued thereon in the same manner as in any other judgment of the Supreme Court. This enables a plaintiff who has obtained a judgment in the County Court to enforce it in the Supreme Court, and practically removes any limitation that might otherwise have existed. There is no similar section in the 9 and 10 Vic., c. 95, and I think that our Legislature in enacting such a provision has disposed of the view taken by the Court in *Berkeley v. Elderkin* as to any distinction between the execution under the judgment of the one Court or the other. In my opinion therefore, the action is rightly brought, and the plaintiff is entitled to judgment. I have, however, to consider whether I should allow the plaintiff the costs of this action. If he had adopted the course open to him under Act No. 959 and sec. 93 of the County Court Statute, he could have obtained a Supreme Court judgment without any of the present proceedings and expense. But the whole of the costs of this action, except the writ, have been caused by the defendant. He pleaded a set off, which at the trial he abandoned, and while admittedly owing the money, he has endeavoured to defeat his creditor upon technical grounds, thereby causing the plaintiff delay, trouble, and expense. As he has failed in his endeavour, he must pay the costs occasioned by it. There will be judgment for the plaintiff for the amount claimed, with costs.

Judgment for the plaintiff for £49 1s. 4d. and costs.

Solicitors for plaintiff, *Braham and Pirani*: for defendant, *O'Hea*.

PROBATE JURISDICTION.

(Before Webb, J.)

In the Will of Henry Theiss Deceased.

April 24th.

Practice, probate — Substituted Executorship. A Testator appointed his widow executrix during her life, and on her decease appointed his son-in-law executor. Probate granted to widow, reserving the right of the son-in-law to come in and prove after her decease.

Henry Theiss died on the 16th March, 1890, having duly executed a will dated 19th February, 1868, whereby he appointed his "said wife executrix . . . "during her life and after her death my son-in-law . . . "executor."

The widow now applied alone for probate to her as executrix.

Power, in support—The appointment of successive executors is good; *Williams on Executors* (7 Ed.) 250; *re Fitzpatrick*, 3 V.L.R I.P.M. 62; *re McVee and Andrews* (11 V.L.R. 116).

Webb, J.—On the authority of the cases cited I grant the application, reserving the rights of the executor to come in and prove on the death of the executrix.

Proctors: *Brahe and Gair*.

(Before Hood, J.)

IN THE WILL OF ALFRED BECKWITH, DECEASED

May 1st.

Practice, probate—Executors according to the tenor "trustees" held to mean "Executors."

Application to appoint the below-mentioned Hannah Beckwith and Thomas Braithwaite executors according to the tenor.

Alfred Beckwith died on the 27th February 1890, leaving a will dated the 10th February, 1890. The will, so far as is material, was as follows:—"This is the "last will and testament of me whereby after payment "of all my just debts . . . . . I, Alfred Beckwith, "of . . . . . will and bequeath to my wife and seven "children" [all his property, specifying it in detail] . . . . "and I hereby nominate for my trustees my "wife, Hannah Beckwith and Thomas Braith-"waite . . . . " There was no appointment of executors, and no directions to the trustees.

Weigall, in support, cited *re Gaunt* (2 A.L.T., 4).

His Honor granted the application.

Proctors, *Weigall and Dobson.*

SUPREME COURT SITTINGS.

(Before Holroyd J.)

BAGLEY BROS. AND CO. V. ELLISON.

April 2, 24.

Promissory Note—Blank left for payee's name—Cancellation of stamp—"Stamp Duties Act 1879" *No.* 645 *s.s.* 46 47, *subs* 11.

A promissory note issued in blank primâ facie implies an authority in a bonâ fide holder to insert the name of the payee.

Semble; if the stamp on a joint and several promissory note, made by two makers, is cancelled by the maker signing last, the note, though invalid as against the first maker, may be valid as against the second.

Action by Bagley Bros. and Co., against John Thomas Ellison to recover L154 16s. 0d. principal and interest due to them as the payees and holders of a joint and several promissory note made by the defendant and one A. M. Johnson.

[The facts appear in the judgment.]

Bryant (with him *Farlow*), for the plaintiffs, opened the case.

Fink, for the defendant. The note contained a blank for the payee's name and instructions were given to Ford who was acting for the plaintiffs to insert the name of Hawkes as payee. The plaintiff by inserting the name of Bagley Bros. and Co., in violation of the instructions have avoided the note. The plaintiffs had no authority to fill in their names as payees; *Crutchley v. Mann* (5 Taunt 529). The date of the note is 3rd May 1889 and the stamp bears date 5-3-89 and the initials J.T.E.; when this note came into the hands of Bagley Bros. it was not duly cancelled under s, 57 subs 4 *Stamp Act* 1879; *Nicholls v. Crispe* (12 V.L.R. 645); *Goldberg v. Devlin* (12 V.L.R. 795); although the name J. T. Ellison appears first on the bill, Johnson really signed first and Ellison therefore was not the proper person to cancel the stamp under s. 47 of the *Stamp Act*, *Goldberg v. Devlin*; *Harriman v. Purches* (9 V.L.R. 234).

Bryant, in reply. It is for the defendants who dispute the valid cancellation to prove that the person who cancelled the stamp did not sign first *per Holroyd, J*; *Harriman v. Purches*. In the hands of a *bonâ fide* holder a bill of exchange may be duly stamped if when he received it, it bore a proper stamp cancelled with the initials of the acceptor and a date a few days subsequent to the date of the drawing *Whitty v. Dunning* (6 V.L.R. 324). Bagley Bros. were bonâ fide holders of the bill and as such were entitled to fill in their own names as payees. *Minet v. Gibson* (1 H.Bl. 608); *Crutchley v. Clarence* (2 M. and S. 90), *Attwood v. Griffin* (Ry. and M. 426); *Byles* on *Bills* (14 ed.) 92.

Cur. ad. vult.

HIS HONOR.—The plaintiffs sued upon a joint and several promissory note made by the defendant and one Johnson, and dated the 3rd of May 1889, the amount of which, with interest, they seek to recover from the defendant. They proved to my satisfaction that they had been the endorsees and holders for value of two joint and several promissory notes made by the defendant and Johnson for £97 8s 7d and L98 1s 3d respectively which, were overdue, and of which they were pressing the defendant for payment; that an offer made by the defendant to James Latrobe Bagley, a member of the plaintiffs' firm, to take up these two promissory notes by his cheque for L50, and another promissory note for L149 14 6d, payable one month after date, was accepted by Bagley; and that in pursuance of this agreement the defendant handed to Mr. Ford, the plaintiffs' solicitor, his cheque for L50, and the note now sued on, to be delivered to the plaintiffs, getting back in exchange the two promissory notes for L97 8s 7d and L98 1s 3d. These two notes, together with a third, had been endorsed to the plaintiffs by way of security for advances past and future by one Hawkes, who was the payee. The three notes which Hawkes endorsed to the plaintiffs he had received from the defendant and Johnson in payment for the land purchased by them from him. The defendant and Johnson had been severally sued upon the third note in Hawkes's name by the plaintiffs' instructions; and the actions had been settled by the defendant Ellison with Ford, acting as for Hawkes, for the sum of L115, including Ford's costs. This settlement was effected two days before the other. When the plaintiffs received the promissory note for L149 14s 6d there was a blank left in it for the payee. The defendant alleged that he had instructed Ford to insert Hawkes's name as payee, and that the name of "Bagley Bros. and Co." had been inserted by Ford in violation of his instructions. The name of the plaintiffs' firm was inserted by Mr. J. L. Bagley. Ford denied that he had been instructed to insert Hawkes's name, or that he

had even observed the blank. There was not a tittle of evidence that either of the plaintiffs was aware of instructions as to filling in the name of the payee having been given to Ford, if any such were given. If the blank had been left with this view, as Ford's managing clerk shrewdly surmised, of allowing the plaintiffs to fill in either the name of their firm or that of Hawkes, as it might suit them, that would have been quite natural, and no more than the plaintiffs were entitled to ask, bearing in mind that Hawkes was liable as endorser on the two promissory notes which they were surrendering. The defendant, however, insisted that Bagley had no authority to fill in the name of his firm as payee, and that by so doing he had avoided the note on which they were suing. The defendant's counsel, arguing for the probability of the defendant's story as opposed to Ford's, stated as defendant's reason for requiring that Hawkes's name should be inserted that he and Johnson had had other transactions with Hawkes, and had claims against him, and that they wanted, if sued on the promissory note, to be able to set off those other claims. Cases were cited on both sides upon the question of Bagley's authority to insert his firm's name as payees. I have examined all these cases and such others as I could find, but none of them, in my opinion, support in the slightest degree the defendant's contention. In *Crutchley v. Clarance* (2 Man and Sel., 90), it was decided that the drawer of a bill of exchange which had been issued by him with the blank left for the name of the payee, and had been filled up by a *bonâ-fide* holder with his own name as payee, was liable in an action of assumpsit brought against him by the holder of the bill. Lord Ellenborough said that by leaving the blank the drawer undertook to be answerable for the bill when filled up in shape of a bill; and Bagley, J., added that issuing the bill in blank without the name of the payee was an authority to a *bonâ-fide* holder to insert his name. In *Attwood v. Griffin* (*Ryan v. Moody*, 426), it was held by Best, C.J., on the authority *Crutchley v. Clarance*, that an acceptor who accepts a bill in blank undertakes to be answerable for it as a bill, and that any *bonâ-fide* holder may insert his own name as payee and endorse it, and the endorsee may sue the acceptor in assumpsit, which is as much as to say that the acceptor, accepting with the payee's name in blank, gives authority to fill in the name of a payee as against him. *Best*, C.J., is reported to have said:—"My Lord Ellenborough's judgment is express that one who accepts a bill in this form undertakes to be answerable for it in the shape of a bill." If the report is correct the Chief Justice was mistaken. Lord Ellenborough was speaking of the drawer. But Lord Ellenborough's dictum, as well as that of *Bayley*, J., must in my opinion be equally applicable to an acceptor as well as a drawer, who passes a bill, or, to speak more strictly, an irchoate or imperfect bill, out of his hands with a blank left for the payee's name. He delivers it to be perfected by somebody. *Chitty* says (10th Edition p. 106):—"In an action against the acceptor the holder must prove an authority from the drawer for inserting his (*i.e.*, the holder's) name as payee, because otherwise the acceptor may not be able to charge the drawer with the value of the bill." For this proposition he cites *Crutchley v. Mann*, (5 Taunt. 529) which is in point, although the head-note is quite misleading. In that case it was held that there was sufficient evidence of such an authority but that proof of the authority was required. However, it was decided in *Harrey v. Cane* (34 L.T. N.S. 64, C.P.D.) that, if the drawer's name is not inserted in a bill, anybody who gets the bill fairly is at least *prima facie* entitled to insert his own name as drawer and sue the acceptor: that is, that merely leaving the blank is *prima facie* evidence of authority to anybody who holds it *bona fide* and without notice to fill it up. (See also *Arde v. Dixon*, 6 Exch., 869, and per Parke Baron, p. 872; and *Hogarth v. Latham*, 3 Q.B.D., 643 per Bramwell, L.J., 647). In none of these cases is it disputed, and I do not see how it could be disputed, that when a bill of exchange is delivered by the drawer to a creditor in payment of a debt, with a blank left for the name of the payee, that is not sufficient, I might say conclusive, evidence, even against the acceptor, of the creditor's authority to fill in his own name. Still clearer, if possible, must be the authority of a creditor to supply such a blank, when his debtor makes and delivers to him a promissory note, and the maker himself is sued. In the present case the defendant himself ought to have inserted the name of Bagley Bros and Co as payees, if he had filled up the note conformably to the terms of his agreement with Mr. J. L. Bagley. His own testimony entirely concurs with Bagley's as to what those terms were. The note sued on was to be given by Johnson and himself and was to represent the balance of the promissory notes returned with interest at 10 per cent. from their due dates and Ford's charges. He and Johnson were to be liable to the plaintiffs for the full amount of the balance. It would have been a fraud on the plaintiffs if the defendant had induced them to accept with their eyes shut a promissory note for this balance so drawn that he could have pleaded a set-off or raised a counter-claim in respect of some transactions between Hawkes and himself, or Johnson and himself and Hawkes. I hardly know how it is put; but, however, it is put, the defence is as inequitable as can be conceived. The defendant had repeatedly implored time for payment, and had been granted great indulgence, on his plea that Johnson could pay nothing, and that he had to be responsible besides for the costs in the action brought against Johnson. It would have been fair if, as I have already intimated, the defendants had allowed the plaintiffs, having their eyes open, the option of inserting Hawke's name as payee, and getting his endorsement to them. But to try and trick the plaintiffs out of the benefit of the promissory note, taken by them in indulgent settlement of their claim against him, would have been a deceitful act on the defendant's part which I do not think he intended to commit. If he did intend it, I must go further and

say that he ought not to be permitted to rely on such a fraudulent intention. Another defence has been urged. It is a very shabby one, and, small as is the point to which it has been reduced, it involves a question of some importance upon the construction of the Stamp Act No. 645. According to the testimony of the defendant and Johnson, the promissory note on which this action was brought was signed first by Johnson at his private house, and afterwards by Ellison in Ford's office, and the stamp was affixed and cancelled by Ellison on the day on which it was handed to Ford, that being the day of its date. Unquestionably Ellison was impliedly, if not expressly, authorised by Johnson to affix and cancel the stamp on his behalf. The stamp affixed was of sufficient amount and effectually obliterated. It bore Ellison's initials, and the figures 5 | 3 | 89 on its face. Ellison's signature to the note is written above Johnson's, leaving very little room for Johnson's name. It is written on a line left for a maker's name, there being only one such line; and looking at the note alone, anyone would suppose that the defendant had signed it first and was the proper person to cancel the stamp. Ford swears that both Johnson's and Ellison's signatures were attached when he received it, and I certainly entertain grave doubt whether Ellison did not sign first, as he appears to have done. The burden of proof lay upon Ellison, and he has not convinced me to the contrary. The defendant's position is that Johnson, having signed the note first, and Ellison having cancelled the stamp, the plaintiffs must rely on the proviso in sub-section 4 of section 57 of the Stamp Act, and have failed to show that when the note came into their hands the stamp appeared to have been duly cancelled as that section required, inasmuch as the figures 5 | 3 | 89 do not represent the true date of cancellation. The act does not prescribe the manner in which the true date of cancellation is to be written. It is merely by a conventional arrangement amongst business men that such a symbol as 5 | 3 | 89 has come to signify anything. It would now ordinarily be taken to mean the 5th day of March in the year of our Lord 1889. But what the writer intended to signify was the 3rd day of May in that year, and by an almost manifest error he has written 5 | 3 | 89 for 3 | 5 | 89. From their knowledge of extraneous facts, the plaintiffs, if they had scrutinised the stamp carefully, could hardly have doubted that a mistake had been made in the date of cancellation written across it, although they could not have been absolutely certain of the fact. On the other hand, looking at the instrument alone, it does not exhibit any defect in the cancellation. If a man puts his name to a piece of blank paper, affixes a stamp to it, cancels the stamp by writing on it his initials, and the true date of cancellation, and afterwards fills up the paper as a promissory note for an amount covered by the stamp and issues it, what illegality is there in this? I know of no law that prevents his doing so. And what is the person to whom the instrument is delivered required to do but to look at the stamp on the instrument, and if there is nothing apparently incorrect in the cancellation, is he prohibited from suing upon it, or further than that, is the judge at the trial or hearing of the action prohibited from receiving it as evidence? I think not, and for that reason I hold that the objection taken by the defendant's counsel cannot in law be sustained, assuming the evidence of his witnesses on the point to be true. Another ground might be suggested for refuting this objection. It was not urged, and therefore I wish not to pronounce any opinion upon it, but to mention it, as it is worthy of consideration. The note sued on was a joint and several promissory note. Treat it as waste paper so far as Johnson is concerned. Ellison alone has been sued upon it. Is it not good against him? The stamp was proved to have been affixed to it by him, if his evidence was true, at the time when he signed the note, and therefore, so far as regards his several liability, at the proper time. Are not, then, the plaintiffs protected by sub-section 1 of section 47 as against Ellison, or is the effect of this subsection in their favour as against him defeated by the fact of Johnson's name also appearing as a maker of the note? (See *Goldberg v Derlin*, 12, V.L.R.) I direct judgment to be entered for the plaintiffs for £159 10s. 8d. (being for the principal of the promissory note and interest thereon at 8 per cent from its due date to the 2nd of April, up to which time the interest was calculated by Mr. Rennick), with costs of the action.

Judgment for the plaintiffs for £159 10s. 8d. and costs.

Solicitors, for plaintiffs, *Ford*; for defendant, *Herald*.

IN THE SUPREME COURT OF TASMANIA.

(Before Sir Lambert Dobson, Chief Justice)]

(IN CHAMBERS).

RUMPFF v. LEE

——— April 10 and 14, 1889

Rumpff v. Lee, Cascade Brewery Company Limited, Claimants. Bills of Sale Amendment Act, 31 Vic. No. 14 *s. 7.—Renewal of registration—Affidavit—Statement of residences of parties—Possession under void bill of sale good as against Sheriff—Interpleader.*

Solicitor General for claimants.

Mugliston for execution creditor:—The bill of sale is void as the affidavit made on the re-registration of the bill does not state the residence of the grantee as it was stated in the bill of sale Ex. p. Webster *in re* Morris 22 ch. D. 137.

THE CHIEF JUSTICE.—This case comes before me on an interpleader summons taken out by the Sheriff. On February 28th, 1884, the defendant Lee, being the landlord of the Imperial Hotel, George's Bay, assigned all the chattels, etc., in the Hotel by a bill of sale to the Cascade Co., to secure the sum of £533

paid to him by the company. The bill of sale was renewed from time to time, and lastly on March 5th in the present year. On March 7th, the company under its seal, appointed Thomas Haley, and Thomas Merrick, his deputy, to receive the money due under the bill of sale, and in case of default being made in payment of it to seize the chattels assigned. Haley served a demand in writing for payment, and after default had been made for 24 hours he entered and seized the chattels, and left his deputy, Merrick, to retain possession on behalf of the company. On the 17th March Haley posted on the front of the hotel, in the bar, and on the water trough in front of the hotel and on the telegraph poles through the township, a placard announcing that the chattels had been seized by the Cascade Co., and would be sold, and an advertisement that the chattels would be sold on the 20th March, was inserted in *The Mercury* on the 18th March. Merrick, from the time of his taking possession, received the moneys taken in the hotel. Rumpff recently recovered judgment against Lee, and a writ of *fi. fa.* was issued to recover the judgment debt, and was placed in the hands of the Sheriff's bailiff, Morling, to execute. Rumpff had also obtained a judgment against Merrick, the deputy-bailiff, and had some weeks previously obtained an order for commitment against him under the Debtor's Act for non-payment of the judgment debt. Merrick swore that Mr. Grant, the solicitor for Rumpff, promised that he (Merrick) should have six weeks within which to pay the debt before an order for his commitment should be enforced and that only four weeks had expired on March 19th. Mr. Grant informed Morling, the Sheriff's bailiff that the Cascade Co. was in possession, that he meant to dispossess them, that he was going to arrest Merrick, and that he (Morling) was then to go in. Mr. Grant proceeded to cause the order of commitment to be enforced against Merrick for failing to pay the debt due by him to Rumpff, and a policeman went to the Imperial Hotel when Merrick was in possession, and arrested Merrick on the commitment, and took him away down the township. Haley saw him in custody, paid the money due, and at once sent him back to the hotel to continue to hold possession. He was absent for 20 minutes. In the meanwhile, so soon as Mr. Grant had secured the removal of Merrick from the premises, the Sheriff's bailiff, Morling, by Mr. Grant's direction, entered and seized under the *fi. fa.* on behalf of Rumpff. Merrick returned, and he and Morling continued on the premises. The sale commenced on the 20th, as advertised, when it was stopped by the Sheriff's bailiff on written instructions from Mr. Grant. It was subsequently proceeded with on the 21st. These are the facts so far as material. Before me, the affidavits filed on renewing the bill of sale were objected to as being informal, and the last one so clearly failed to give effect to the statutory requirements of the Bills of Sale Act, that it was conceded that the bill of sale was void as against an execution creditor for want of valid renewal. The right of the parties, then, depended upon whether possession of the chattels was taken and retained by the company before and at the time the Sheriff's bailiff assumed to seize them under *fi. fa.* This position seemed to be questioned during the hearing of the summons. But in *Emanuel v. Bridger*, *L.R.* 9 *Q.B.* 286 (followed in *ex parte Joselyne*, 8 *Ch. d.* 326), it was held that where the grantee of a bill of sale takes possession of the goods comprised in it and advertises them for sale as the goods of a grantor, sold under a bill of sale, the goods though still in the house of the grantor are no longer in the apparent possession of the grantor within the meaning of the Bills of Sale Act, and the bill of sale, although not duly registered, is valid against an execution levied on the goods of the grantor. *Mr. Mugliton* contended for the execution creditor, Rumpff, that when Mr. Grant had caused Merrick to be removed by the constable under the commitment order, that the possession by Merrick for the Cascade Company was thereby abandoned, and that Morling could at once lawfully enter and seize for Rumpff, and the rights of the parties on this summons depend upon this question. I have found no case as to what would amount to abandonment of possession under a bill of sale; but there are cases as to abandonment of possession by a Sheriff's bailiff, and also by a broker distraining for rent. As to a Sheriff's bailiff, the law is that he must "continue in actual possession of goods seized," *Watson*, 273. In *Ackland v. Paynter*, 8 *Price*, 99, Garrow B. says 'The case of *Blades v. Arundle* does not establish that an occasional absence (by a Sheriff's officer) would amount to an abandonment." He adds, "But surely a man might leave the premises on some occasion, as for food, for instance.' In that case the Sheriff's officers were seen on several occasions five or six miles away from the farm on which they had levied. Richard (chief Baron) said, "Any absence, unless satisfactorily explained and accounted for would, however, be *prima facie* an abandonment." Graham B., in the same case, says: "I do not mean to lay down the general proposition that a Sheriff can in no case quit possession without any qualification; but I should consider that to show it not an abandonment, he ought to be able most clearly to account for it, as being caused by some urgent necessity, and to give satisfactory evidence of that." In the more recent case of *Bannister v. Hyde*, 29 *L.J.*, *Q.B.*, 141, a broker, who was put into possession of goods distrained for rent, went out of the house for the purpose of getting some beer for his meals, which he took on the premises, and on his return found that the tenant had locked the outer door, and refused him admittance. He burst the door and re-entered, and the Court held that he was justified. The Judge left it to the jury whether the broker left with the intention of returning, and they decided in the affirmative. Here Rumpff, through his solicitor, caused Merrick to be removed from the premises against his will, and then took advantage of his compulsory and involuntary absence to seize the goods, which it was his duty to hold. Merrick's absence was created by urgent necessity. The money due was at once procured and paid, and he thereupon returned to his post after an absence of 20 minutes

only. This seems to me to be a short temporary absence, created by urgent necessity, and undertaken *animo revertendi*. It is an absence far better accounted for than that of the broker who went off the premises for beer. I am of opinion that it would be discreditable to the law, if such a course of procedure as that which was adopted in this case could prove successful and alter the rights of the parties. My judgment is for the claimant with costs.

Hookey and Young (agents for *H. Grant*) Solicitors for execution creditors; *Dobson, Mitchell and Allport*, solicitors for claimants.

(Before Sir Lambert Dobson, C.J.)

IN BANKRUPTCY.

Ex p. EXECUTORS OF J. LORD *in re* ST. HILL.

March 31st, 1890.

Undischarged bankrupt—Second adjudication of bankruptcy—Validity.

Windell Hill St. Hill, a retired colonel, was adjudicated a bankrupt on the 22nd April, 1880 and had never obtained an order of discharge. On the 11th March, 1890 a bankruptcy petition was presented against St. Hill by the executors of the late John Lord who alleged themselves to be creditors for L98 in respect of a judgment obtained by the late John Lord against St. Hill in May, 1885.

D. Crisp for the petitioning creditors:— cited *Morgan v. Knight*, 15 C.B. (N.S.) 669 and *Ex p. Watkin re Roberts* 12 ch. D. 380.

Perkins for St. Hill:—The petition is bad as it does not comply with the form, being headed "*In* the Supreme Court" instead of being addressed "*To* the Supreme Court." (2) The adjudication ought not to be made, as St. Hill was at the time of the presenting of the petition and still is an undischarged bankrupt. (3) The Court ought to refuse or adjourn the petition as there was no estate of the debtor's which could be realized.

THE CHIEF JUSTICE.—In *Morgan v. Knight* it was decided that property was not essential to a man being declared a bankrupt.

Perkins.—The petition has been presented against the debtor for political purposes, and for that reason should be dismissed. Moreover, the cases cited for the petitioning creditors are distinguishable as those cases had reference to traders which Colonel St. Hill is not.

THE CHIEF JUSTICE.—"The objection of the word "in" being in the petition instead of the word "to" is too technical to be held at all: it was one of those matters which was settled by the 76th section of the Bankruptcy Act. What was necessary for adjudication by the Court was proof of debt, and there is a record of that in the judgment of the Court, no other proof being necessary, which had been revived in favour of the petitioners. Colonel St. Hill was not a trader, but trade was not necessary to an act of bankruptcy, nor was property essential to bankruptcy, and the question of ulterior motives, such as the political one advanced by the debtor, could not be considered. I see no escape from what was distinctly laid down in the Act and by the authorities quoted. The debt was proved, and there was an act of bankruptcy. I have only one course, and that is to adjudge the debtor a bankrupt.

Crisp and Crisp solicitors for petitioning creditors; *Perkins and Drew* solicitors for debtor.

IN CHAMBERS.

(Before Webb, J.)

GIBBS v. HOWDEN.

22nd April.

Rules of Supreme Court 1884, *Order XIX r.r.* 15-27, *Order XXV. r.* 4—*Points of Law raised in the pleadings—General demurrer is not a good pleading under the present rules of procedure—The point of law relied upon must be specifically stated.*

Application on behalf of the plaintiff under Order XIX. r. 27 calling upon the defendant to show cause why paragraph 4 of the defence should not be struck out on the ground that it is embarassing.

The action was brought (*inter alia*) claiming an indemnity by the defendant as equitable assignee of a lease for the forfeiture and loss of the said lease occasioned by the default of the defendant.

The 4th paragraph of the defence was as follows:—

"He will object that even assuming the allegations in the statement of claim to be true, he is not liable to indemnify the plaintiff for his alleged losses in connection with the forfeiture and loss of the said lease."

Mr. Neighbour in support.—The form of pleading adopted in paragraph 4 of the defence is that of the old form of general demurrer and is opposed to the effect of the present rules of procedure. It is not sufficient to state that the claim discloses no cause of action. The particular point of law must be alleged on which the objection is based. In the forms given in Appendix E sec. III. the particular point of law is in all instances set out. The present pleading is a violation of Order XIX. r. 15.

Mr. Fink to oppose.—If the facts as pleaded do not show a cause of action, it is sufficient to state so without having to set out the particular points objected to.

HIS HONOR said.—A general demurrer is not good pleading now. A defendant must state what the point of law is on which he relies. A mere statement that the plaintiff has no right to recover is not sufficient. The paragraph must be struck out.

Solicitors for the plaintiff, *Wisewould, Gibbs and Wisewould*; for defendant, *Fink, Best and Phillips*

(Before Webb, J.)

BANK OF AUSTRALASIA v. HAMILTON.

23rd April.

Rules of Supreme Court Order XLV. r. 2—Garnishee order—Partnership firm—A garnishee order cannot be made under Order XLV. r. 2 attaching a debt due from a partnership firm described by its partnership name.

Garnishee order *nisi* taken out against a partnership firm in the name of the partnership and served at the place of business of the partnership.

A preliminary objection was taken on behalf of the garnishees that members of a firm must be served individually. A garnishee order cannot be made attaching a debt due from a firm described in in order *nisi* by its partnership name *Walker v. Rooke* 6 Q.B.D. 631.

In support it was contended—As long as a firm carries on business and resides within the jurisdiction the firm may be attached as well as an individual.

HIS HONOR said.—The order *nisi* must be discharged. The case of *Walker v. Rooke* is very clear. The English rules were altered to meet that very case.

Order *nisi* discharged with costs.

Solicitors for plaintiff, *Klingender, Dickson and Kiddle;* for garnishees, *Crisp Lewis and Hedderwick.*

(Before Hood, J.)

REG. v. CANE AND JAMES.

8th and 12th May.

Criminal Law—Money found on prisoners at the time of their arrest—Applications to hand over money found on prisoners at the time of their arrest for the purposes of their defence should be made to the Judge at the trial and not to a Judge in Chambers.

Application on behalf of the prisoners for an order on the police to hand over to their solicitor certain monies found on their persons at the time of their arrest for the purposes of their defence.

The prisoners were committed for trial for a burglary in Victoria. They were arrested in South Australia and certain South Australian bank notes and some cash were found on them at the time of their arrest.

The *Crown Solicitor* stated that the money was not required for identification but submitted that as no presentment had yet been filed in the Supreme Court the prisoners were not before the Court and therefore there was no jurisdiction to make the order. It was also stated that the same objection was taken in the case of *Reg. v. Lawrence* ante pg. 147 before Hodges, J.

Mr. MacHugh in support relied on *Reg. v. Lawrence.*

HIS HONOR said I will consider the matter.

HIS HONOR on a subsequent day said :—This was an application for an order that certain monies found on the persons of the prisoners at the time of their arrest should be handed over to them for the purposes of their defence. The affidavit in support states that the prisoners had certain bank notes on a South Australian bank and a certain amount in cash amounting to £10 12s. 0d. which they swear is their own money and not the proceeds of the robbery. The Crown has not filed any answering affidavit and I therefore take it that the moneys belongs to the prisoners and the police were wrong in taking it away from them. The Crown Solicitor has raised an objection to my jurisdiction in Chambers to entertain the application in as much as no presentment has yet been filed in the Supreme Court and that therefore the prisoners are not before the Court. The only authority cited was *Reg. v. Lawrence* ante pg. 147 and the Crown Solicitor stated that the same objection had been made in that application as in the present but the case however as reported does not show this and I have consulted Hodges J., who informs me that the objection was not taken and that he did not consider the question of jurisdiction. I have examined the following cases *R. v. Williams*, 1 A.J.R., 40; *R. v. Jones* 6 C. and P. 342, *R. v. Bass* 2, C. and K. 822; *R v. O'Donnell* 7, C. and P. 138; *R. v. Kinsey*, 7, C. and P. 447; *R. v. Burgess*, 7, C. and P. 488; *R. v. Coxon* 7, C. and P. 651; *R. v. Barnett* 3, C. and P. 600; and *R. v. Frost*, 9, C. and P. 131, and in each one of them I find that the application was made to the Judge at the trial and I find no reported decision the other way. In a little book called the Victorian Police Guide, by Senior Constable Barry, a book which it would be well if the police studied more carefully, I find three cases cited and one of them is cited as follows :—"An application was made to Mr. Justice Williams for an order on the gaoler at Haverford West to give up to the defendant (who since his apprehension has been admitted to bail) a sum of £20 which had been taken by the gaoler from the prisoner, and was then in the gaoler's possession. The defendant was charged with cattle-stealing, and it appeared that the cattle alleged to have been stolen were the defendant's own cattle, which had been distrained for rent, and the cattle had not been disposed of by the defendant. Counsel informed the Court that the gaoler only required the authority of the Court. Mr. Justice Williams, in reply to counsel, said he had no summary jurisdiction over the gaoler, but if he wants a speculative opinion of mine, I have no hesitation in saying that if the money has nothing to do with the charge, it ought to be given up. I believe it is the constant practice on circuit, indeed, it is done every day, to order money to be given back to prisoners which has nothing to do with the charge against them. *R. v. Griffiths* 8, J.P., 66." (The reference appears incorrect for I have not been able to find the case in this report). I therefore think I have no jurisdiction to make the order in Chambers as the application should be made to the Judge at the trial. I dismiss the application, but, as in my opinion, the police have no right to retain the money in the present case, I dismiss it without costs.

Solicitors for the Crown, *Crown Solicitor*; for the prisoners, *Wm. Smith.*

(Before Hood J.)

LONDON DISCOUNT AND MORTGAGE BANK LIMITED v. DAISH AND ORS.

12th May.

Rules of Supreme Court 1884—*Order IX r. 2—Substituted service—Affidavit—The affidavit in support of an application for substituted service should state how the service is proposed to be effected.*

Application on behalf of the plaintiff for an order for substituted service of the writ with regard to the defendant Bradley. The affidavit filed in support of the application did not state how the proposed service was to be effected.

HIS HONOR said:—In all applications for substituted service the affidavit in support should state how the service is proposed to be effected. Chitty's Forms 12th Ed. 91. As the affidavit in the present instance does state this I must dismiss the application. The plaintiff can, however, renew the application on proper materials.

Solicitors for plaintiff, *Pavey*, *Wilson*, and *Cohen*.

SUPREME COURT SITTINGS.

(Before Hood, J.)

HAYES v. LEVINSON.

May 9th, 15th.

Champerty.

Champerty implies a bargain of some sort between the plaintiff or the defendant in a cause and another person who has no interest in the subject in dispute to divide the property sued for between them if they prevail in consideration of that other person carrying on the suit at his own expense; it is essential, however, to make such a transaction champerty that the person carrying on the suit at his own expense should have no interest in the thing at variance.

Question of law reserved for the decision of the Supreme Court by a Warden of the Goldfields at Ballarat.

Finlayson appeared for the plaintiff.

Goldsmith (with him *Wasley*) for the defendants.

[The facts and arguments appear in the judgment.]

HIS HONOR.—This was a question of law reserved for the opinion of this Court by the goldfields warden at Ballarat, under section 22 of the Mines Amendment Act 1872, No. 446, in a proceeding before him, in which Anastasia Hayes was complainant and Mark Levinson defendant. By her summons the complainant sought to have it declared that the defendant was in illegal occupation of certain Crown lands at Ballarat East contrary to the Ballarat mining by-laws, and that the defendant should be ordered to remove therefrom, and that possession thereof should be given to the complainant. The complaint came on for hearing on October 5 1889, and it was proved that the defendant was the registered holder of a machinery area on the land in question, but was not the holder of any claim or water-right under the by-laws. The complainant's son was then examined, and produced a miner's right in his mother's name, but in cross-examination he stated that he took out this right for his mother, a woman of 70 years of age, and paid for it out of his own money, and that it was taken out for the purpose of these proceedings, he having given the instructions for the summons and being liable for the costs. He further stated that he had applied to be registered for part of the land in question, and had been registered for part of it, and was interested in the present suit, and wanted to get a clear title to the ground, as he had improvements on it and a residence area, and had taken these proceedings in his mother's name under legal advice with the object of clearing his title to the ground. Upon this evidence it was contended for the defendant that champerty was disclosed, and the warden expressed his intention of finding in favor of the defendant on this ground, but at the request of the complainant's solicitor, he has stated this question of law for the opinion of this Court, "Did the evidence given disclose champerty." No Court will enforce a contract tainted with champerty, and whenever the right of the plaintiff in respect of which he sues is derived under a title founded on champerty or maintenance, his suit will on that account necessarily fail. But there is no case in which a plaintiff who has a right has been defeated in the enforcement of that right because of any collateral champertous bargain he may have made in connection therewith (*Collins v. Hayes*, 6 W.W. and A'B. M. at p. 11; *Hilton v. Woods*, L.R. 4, Eq. 432.) So that if the defendant here is in illegal occupation of this ground, and the complainant is entitled to possession, the fact that there is a champertous arrangement between herself and her son, not in issue in this suit, would not be any bar to her success. If the plaintiff's case is not founded upon any such bargain, but is otherwise valid, she is not to be defeated by reason of any collateral illegal agreement she may have made with a stranger. Therefore, I do not think that the evidence disclosed champerty so as to afford a defence to the defendant if illegally in possession, but as the case has to go back to the warden it may save expense if I state that in my opinion the evidence does not point to champerty at all. Champerty implies a bargain of some sort between the plaintiff or the defendant in a cause and another person who has no interest in the subject in dispute to divide the property sued for between them if they prevail in consideration of that other person carrying on the suit at his own expense. Such a bargain is unenforceable, as it has been considered to be contrary to public policy to allow strangers to interfere and foment litigation. But the rule does not apply when the person maintaining the action has an interest in the thing at variance. He is doing no wrong to any one if he is merely assisting a plaintiff in establishing a common title against a wrongdoer, especially where such assistance is not purchased under any agreement by which the party assisting gets a share in the

subject matter of the action, which he otherwise would have no title to. (See *Guy v. Churchill* 40 Ch. D. 481, *James v. Kerr*, 40 Ch. D., 449. *Bradlaugh v. Newdigate*, 11 B. D. 1, *Wood v. Freehold Co.*, 1 V.R., Eq. 168, and cases there collected.) In the present case it is true that the son of the complainant is paying the costs, and is therefore assisting in the suit, but his real object is plain. He claims a part of the land sued for, and is therefore desirous of proving that the defendant is illegally in possession. He is advised that, under the mining law, the defendant's title to that land may be tested in a complaint by any person holding a miner's right, and he has put forward a dummy for whom he has purchased the necessary qualification to act as nominal plaintiff. If the suit succeeds, the son may get a portion of the property, but if so, he will get it by virtue of his own title, and not by reason of any agreement to divide with the complainant, his prior registration prevailing over the subsequent miner's right. I can discover no evidence of any bargain by which the complainant agrees to give up portion of the land to which she may be entitled in consideration of her son furnishing the means to pay costs. I rather consider the son as the real plaintiff, and the case analogous to those in which a stranger is put forward to trespass upon realty with the object of an action being brought to try title. In such a case the stranger is a nominal party, the claimant being the real suitor, bearing all the expense, but there would be nothing illegal or champertous in such arrangement. It was suggested by the defendant's counsel in his argument that Hayes's evidence had been misunderstood, and that he did not intend to lay claim to any of the land in dispute, but was referring to some other land, and it was then urged that he is not interested so as to be excluded from the charge of champerty. This argument defeats itself. If Hayes is not claiming any of the land in dispute, there is an end to the accusation of champerty, for then he is not dividing the property with the plaintiff, and the fact that he is paying the costs, which might amount to maintenance, would then be answered by his relationship to the plaintiff, for the relationship of son to mother will justify maintenance though not champerty (*Hutley v. Hutley*, L.R. 8. Q.B., 112). I therefore answer the question asked in the negative, and as the defendant has failed he must pay the costs of this special case.

Solicitors for plaintiff, *Watson* for *Pearson & Mann, Ballarat*; for defendant, *Cuthbert & Co.*

(Before Hood, J.)

IN THE ESTATE OF ELIZABETH MADDEN DECEASED.

May 15 16.

Practice, probate—Administration—persons entitled—Unfitness—Intestates Act 1864 (*No* 230) *sec.* 12 *If the person entitled to a grant of administration within the meaning of the "Intestates' Act* 1864" *sec.* 12 *is unfit the Court may exercise its discretion and refuse the application.*

Motion to make an order *nisi* obtained for the administration of the estate of Elizabeth Madden deceased by the husband Michael Madden, absolute.

The facts were as follows; Elizabeth Madden died intestate on the 26th March 1890 leaving property of the value of £1580; she left surviving her, a husband and 3 children. The husband applied for letters of administration on the 1st May, but as it appeared that a caveat had been lodged by a brother of the deceased, an order *nisi* was made returnable on the 8th; on that day the hearing was adjourned till the 15th. Oral evidence was taken and it appeared that the applicant was of intemperate habits and had, also, already, appropriated and converted to his own use certain goods of the deceased. The objection of the caveator was that the applicant was unfit to have the grant of administration made to him.

Cook in support of the rule:—The husband is entitled as of right to the grant of administration: the judge has no discretion.

Dr. MacInerney (*Davies* with him) contra; the judge has discretion; in *Re Nimmo* (4 A.J.R. 142) the English cases do not affect the argument, because in England the husband is entitled to the whole estate left by the wife; in Victoria the husband is placed in the same position as the wife by *sec.* 25 of the *Married Women's Property Act* 1884; accordingly the law applicable to the widow in England is applicable to the husband in Victoria; that law is determined by 20 & 21 *Vict c.* 77 *s.* 73; the following cases have been decided on that point; *Re Ward* (9 A.L.T. 128); *Allen v. Humphreys* (8 P.D. 16); *Re Farrands* (1 P.D 439); *Re Weir* (2 S & T 451); the only case which appears to be against the contention of the caveator is *Re Whitney* (11 V.L.R. 752.)

Cook in reply; *Re Whitney* decided that such a case as this is governed by the English practice: that practice is laid down in *Williams on Executors* (7 Ed.) 409; as to the argument based on *The Married Women's Property Act* 1884, that Act related only to the distribution of the goods of an intestate and not to the right to obtain administrati n. [*Per Curiam*; the cases of *Re Buckley* (3 A.J.R. 131) and *Re Nimmo* (4 A.J.R. 142) appear to govern this case]: neither of these cases were like the present case and the observations of the judges in these cases must be taken in connection with the facts before them; there is no case which decides that, when the husband is willing to administer the estate and has not waived his right, he is not entitled as of right to the grant, unless he is of unsound mind.

HIS HONOR: In deciding this case I am greatly influenced by the words of *Stawell, C.J.*, in "*in re Buckley*," which was a case on appeal; he says in giving judgment in that case, "strictly speaking, as "urged before us, no person is entitled. For the Court "may exercise a discretion as to the person to be in- "trusted with administration. 'Entitled' in this "section (27 Vic. 230 s 12) must therefore mean—not "a person entitled at law, but one who, being in other "respects, unobjectionable would be entitled according "to the practice of the court to have administration "committed to him." As regards the case of "*Re*

Whitney," *Molesworth J.*, while saying that the right of the husband is regarded as unlimited, went further and went into the question of fitness, and I can see no reason why he discussed that question at all if he felt that he had no discretion in the matter. Therefore I think I have a discretion and I find that the applicant for administration is an unfit person to discharge that duty. The order must be discharged with costs.

Proctor in support, *Herald*; to oppose, *Lyle*.

SITTINGS IN BANCO.

(Before Higinbotham, C.J., Holroyd and Hood, J.J.)

In Re TRANSFER OF LAND STATUTE *ex parte* WISEWOULD

March 13 and 14

Transfer of Land Statute s.s. 38, 129 *sub-sec.* 3—*Administration Act* (1872) *ss.* 6 *and* 10. *The commissioner of Titles has no power to refuse to register a transfer from an executor or executrix to a devisee until proof has been given that all the debts owing by the testator's estate have been paid or duly provided for.*

Summons referred to the Full Court by Kerferd, J.

This was an application by one Mrs. Wisewould as executrix of the will of her husband to have a transfer of land registered from herself as executrix to herself as devisee. The Commissioner refused to register the transfer until evidence had been produced sufficient to satisfy him that all the debts due by the testator's estate had been paid or duly provided for.

He relied upon "The Administration Act (1872)" and "The Transfer of Land Statute" as giving him power to refuse to register such a transfer until such evidence was produced, because otherwise, creditors' claims against the estate might be liable to be defeated by a transfer to the executrix as devisee only. He further contended that he had power to enquire into the validity of an instrument lodged with him for transfer and that this gave him a discretion to see that creditors' rights were protected.

Higgins, for the Commissioner.—Under s. 71 of the Administration Act (1872), the real estate of a deceased person shall be assets in the hands of his executor or administrator for certain purposes—amongst others, for the payment of debts due by deceased. Section 38 of the Transfer of Land Statute would seem to give power to the Commissioner to refuse such a transfer as this when the effect is that creditors' rights might be defeated. Under s. 129 sub-sec. 3 of the Transfer of Land Statute the registrar is directed to interfere so as to prohibit a transfer "for the prevention of any fraud or improper dealing." Under this section he may enquire into the validity of an instrument lodged for transfer, and this, it is submitted, gives him a discretion in seeing that creditors' rights shall be protected. Hitherto the practice of the Titles Office has been to refuse such a transfer as this, until the evidence required has been produced. The Commissioner was right in refusing to register this transfer to the appellant.

Topp (with him *Agg*) for the appellant was not called upon by the Court.

C.A.V., March 17th.

HIGINBOTHAM, C. J.—We think that the grounds on which the Commissioner refused to sanction the registration of this transfer have not been substantiated. The application was by the executrix of the testator, who was also devisee of the property to register a transfer of that land direct to herself. The refusal of the Commissioner has been supported on two grounds. The first was under the Administration Act 1872, the executrix in her character as executrix, irrespective of any devise, did not stand in the position of a person who was entitled to claim a transfer under the Act until the debts due to the creditors of the testator had been paid or provision had been made for their payment. We do not think that the Administration Act 1872, No. 427, justifies that ground. By that Act an executor who obtains probate has vested in him by the 6th section all the estate of the deceased person, for the whole estate therein of that person and by the 10th section the executor is to have the same rights and be subject to the same powers and to the same duties with respect to real estate that an executor or administrator heretofore had or been subjected to with respect to personal estate. Now, unless it can be contended that by virtue of this Act there was a charge to be entered on the real estate in favour of the creditors of the testator distinct from and in addition to any duty in respect to the personal estate of the deceased, we think that there could be no ground on which it could be contended that an executor in relation to the real estate stands in a different position or has different duties imposed upon him by virtue of this Act from those which devolve upon him by virtue of his character as executor. The second ground of the Commissioner's statement is founded upon the Transfer of Land Statute. The Commissioner contended that being by virtue of that statute a judge of the validity of all instruments, he was justified in coming to the conclusion that the transfer in the present case should not be registered until it was proved to his satisfaction that all debts had been paid or duly provided for. We do not find in the statute any authority created in the Commissioner to refuse to register the transfer on the ground stated. The sections which have been referred to do not appear to give any such authority. Section 38 relates exclusively to documents declaring trusts and the powers given to the Commissioner under that section must be limited to cases in which the section was applicable, namely, cases in which the document declaring the trusts, was sought to be registered. Section 129, sub-section 3, not only confers large powers on the registrar, under the direction of the Commissioner, to take steps for the prevention of fraud, but it also proceeds to state the method, and the only method in which the registrar is at liberty to take to effect these objects. It is limited to cases in which the regisrtar

by direction of the commissioner lodges a caveat, that has not been done here. There is no pretence of legal authority for the practice, which it was said has existed in this office for some years. We are of opinion that there is no legal authority for this practice. It is a practice which is not only not required by any apparent necessity, but is a practice inexpedient in its character, and possibly in its effects. It could not be said in any way that creditors were not able to protect all their own rights and interests, and that there existed any necessity for protecting creditors by applying the powers of a public office to secure for them the real estate where no such provision existed in respect to the personal estate. I may say for myself that the practice might lead to the most dangerous consequences, for if it were generally known that the office lent itself to the practice of protecting creditors until their claims were paid or provided for, the consequences might be that it would be contended that the practice created a right in the creditors, and if therefore from any cause the office neglected to take this course, and should permit a transfer to the detriment of the creditors, it was quite possible that a claim might be set up against the assurance fund by creditors, on the ground that the recognised practice had been departed from. The duties of this department are difficult, and it requires, and possesses, and is vested with full powers for the purpose of protecting the rights of the public against all cases of fraud and dishonesty, but I think it would be very dangerous if a practice should be sanctioned outside the statute and the administration of the statute by which creditors as a body should be encouraged to believe that they possessed any rights under the statute against real estate which they do not possess against personal property. They must protect themselves, and so long as the Act does not impose a duty, or give the commissioner power to make himself custodian of the property for the creditors, it seems wholly inexpedient to recognise a practice which seems to give them a right. The order will be that the transfer shall be registered, and that the applicant shall have her costs against the registrar. The effect of this will be that her costs shall be paid from the assurance fund.

Order made to register the transfer with costs.

Solicitor for Commissioner, *Crown Solicitor*; for applicant, *Wisewould, Gibbs & Wisewould.*

(Before Higinbotham C.J., Williams & a'Beckett, JJ.)

GOODALL v. THE AUSTRALIAN FREEHOLD BANKING CORPORATION.

Negotiable instrument—Transfer of debentures—Bona-fide holder for value—To avoid the title of a transferee for valuable consideration it is not sufficient to prove that he took the debentures under circumstances which would have put an ordinarily prudent man of business on enquiry, as to the transferor's title; it must be proved that the transferee wilfully shut his eyes to the facts and matters of what he had notice, and purposely abstained from enquiry, for the purpose in his own secret mind of avoiding knowledge.

Sheffield v. The London Joint Stock Bank, 13 *App. Cas.* 333 commented on.

Questions reserved by WILLIAMS J. for the opinion of the Full Court. The facts are fully stated in the judgment of the Chief Justice.

Madden and *Mitchell*, (with them *Hood*) for plaintiff. On the findings of the jury the plaintiff is entitled to a verdict. They cited *Sheffield v. The London Joint Stock Bank*, 13 App. Cases 333, *Hayes v. Robertson*, *Argus* 6 Sep. 1889, and *London and County Bank v. Grovin*, 8 Q.B.D, 288.

Higgins and *Isaacs*, (with them *Purves*, Q.C.) for defendants. *Sheffield v. The London Joint Stock Bank*, is distinguishable; in that case the bank knew the transferor was not acting by right of ownership: there is no such finding here. To press that case any further would be to upset a long series of authorities. They referred to *Goodman v. Hardy* 4 A. & E. 870, *May v. Chapman*, 16 M. & W. 361, *Swan v. North British Railway Co.*, 2 H. & C. 285, *Bank of Bengal v. McLeod* 7 Moo. P.C. 35, *Jones v. Smith*, 1 Hare 55, *Jones v. Gordon*, 2 App. Cas. 616 and the notes to *Miller v. Race*, 1 *Sm. Leading Cases.* (9th Ed.) page 491.

C. A. V. 31 March, 1890

HIGINBOTHAM, C J., read the following judgment: —Arguments in this case were heard at the end of November last before my brothers Williams, J., and A'Beckett, J., and me. Mr. Justice A'Beckett intimated before he left Victoria his concurrence in the judgment of the Court. The plaintiff was the owner of a considerable number of debentures, Victorian Government debentures, and municipal debentures issued under the authority of the "Local Government Act 1874." They were all negotiable instruments transferrable by delivery, and entitling the bearer of the coupons to receive payment of the interest. He deposited these with the National Bank of Australasia, Melbourne, from whose strongroom they were stolen by George Lake Onyans, the confidential clerk of the manager of that bank, and one of two officers entrusted with a key of the safe in which the debentures were kept. Onyans applied for, and obtained, an advance upon one debenture from the manager of the defendant bank, to whom he was favorably known, in July 1887. He continued for about a year and a half, down to December, 1888, to obtain advances, including one for L5,500, upon the security of the stolen debentures, from the directors and manager of the defendant bank, to whom the securities were produced, and who made no enquiries except from Onyans himself. This action was brought by the plaintiff to recover his debentures or their value, L5,500. The statement of claim charged the defendant with detention of the plaintiff's debentures, and alternatively with having received them from Onyans without due caution, and with a knowledge, or the means of knowledge, that Onyans had stolen them.

When the defendant's case was proceeding the plaintiff's counsel made the admission that the plaintiff did not charge the defendant bank with fraud or dishonesty. The learned judge, at the request of the plaintiff, put the following four questions to the jury: First—Under the facts and circumstances of this case, was the defendant bank justified, without enquiry, in assuming, when it took the debentures, that Onyans was the owner of the debentures, and authorised to deal with them and pledge them? Second—Upon the facts and circumstances of this case, was the defendant bank justified, without further enquiry than it did make, in assuming when it took the debentures, that Onyans was the owner of the debentures and authorised to deal with them and pledge them? Third—Had the defendant bank notice of such facts and matters as would make it reasonable that it should, when it took the debentures, have made inquiries into the title of the depositor, Onyans? Fourth—Under the facts and circumstances of this case did the defendant bank take these debentures without making those inquiries as to the bearer's title to them, or right to their custody which in your opinion an ordinarily prudent man of business would have made, or would be bound to make? The jury answered the first and the second question in the negative, and the third and the fourth question in the affirmative; and the judge has reserved for this Court the question, whether notwithstanding the findings of the jury the defendant bank is entitled to judgment. All these questions are pertinent to the inquiry whether the defendant bank became the *bonâ fide* holder of the plaintiff's debentures, and was entitled in equity and good conscience to detain them to the extent of its advances against the true owner. As the debentures were tranferable by delivery the transfer of them by Onyans for good consideration presumptively conveyed the legal title in them to the bank, free from any claims or equities against them notwithstanding the want of title in the transferor. It was incumbent on the plaintiff, therefore, to rebut this presumption, and to show that the bank was not a *bonâ-fide* holder. This, according to a long chain of authorities, might and must be done by adducing satisfactory proof either that the holder had notice of the infirmity of the title of the transferor, or that he had notice of such facts and matters as would make it reasonable that inquiry should be made by him into the title of the transferor before he accepted delivery of the instruments. See per Lord Bramwell in *Sheffield v. The London Joint Stock Bank Limited*, 13 App. Cas., at p. 344-5. If the transferee had actual notice of the transferor's want of title, it is plain that he cannot have a *bonâ-fide* claim to ownership against the original owner, who has not parted with his rights in the instruments. But if the transferee had not actual notice of the transferor's want of title, but only had notice of such facts and matters as would make it reasonable that he should inquire, a different case, involving new obligations, would arise. He ought, as a prudent man, in such a case to make inquiries, but the omission to make such inquiries will not alone be sufficient to establish the want of *bona-fides* in the transferee. The omission by the transferee to make inquiry through mere carelessness, negligence or imprudence in not suspecting something wrong when he has notice of facts and matters that might reasonably give rise to suspicion and suggest inquiry, will not be sufficient proof of want of *bona-fides*. See per Lord Blackburn in *Jones v. Gordon*, 2 App. Cas. p 629. To prove want of *bona-fides* in such a case, the jury or whoever has to try the question of *bona-fides* must come to the conclusion that the transferee, in omitting to make the inquiry he ought to have made, was not honestly negligent or honestly imprudent or blundering, but that he wilfully shut his eyes to the facts and matters of which he had notice, and purposely abstained from inquiry for the purpose in his own secret mind of avoiding knowledge. Evidence justifying such a conclusion would clearly show not only that the holder of the instruments had had a suspicion of the truth, but also that he had dishonestly and fraudulently determined not to know the truth, and consequently that he was not a *bona-fide* holder. See per Parke B in *May v. Chapman*, 16 M. and W. 355, and *Jones v. Smith*, 1 Hare 55. This distinction between a knowledge of and neglect to inquire into facts and circumstances calculated to excite suspicion, and a dishonest abstaining from inquiry into such facts and circumstances, has been well established since the year 1849, when it was held by the Privy Council in the case of *The Bank of Bengal v. Fagan*, 7 Moore, P.C., 35, that the case of *Gill v. Cubitt*, 3 B. and C., 466 (followed by other cases to the same effect), in which it was held that the jury were properly directed to consider whether the holder had taken the instrument under circumstances which ought to have excited the suspicion of a prudent and careful man, laid down a rule that it was not law. The argument for the plaintiff rested exclusively on the judgment of the House of Lords in the case of *Sheffield v. London and Joint Stock Bank Limited*, 13 app. cas., p. 333, and it has been contended that by this judgment a series of previous authorities has been overruled, and that it must now be taken to be the law that if a transferree have knowledge of facts and matters that would make it reasonable that inquiry should be made by him, the omission to make such inquiry will of itself, and without egard to the state of the mind of the transferee as being merely negligent or intentionally dishonest, avoid his title. If such be the legal effect of this judgment, I think that the judgment should not be followed. But the ground of the decision in that case will, I think, appear on examination of the judgment delivered to have been that the defendant bank's course of dealings with Moseley, the depositor, operated, in the opinion of the members of the Court, as actual notice to the bank that the securities deposited with it were not, or might not be, the property of Moseley, and that in dealing with them he was not acting by right of ownership. As the bank had either actual knowledge or reason to believe that the securi-

ties might be Moseley's own, or might belong to somebody else, it was held that it could not be regarded as the *bona fide* holder of them as against the original holder. (See per Lord Chancellor at p. 341, and per Lord Macnaghten at p. 348.) Passing to the consideration of the facts of the present case, and the special findings of the jury, it appears to me that the admission made by the plaintiff disposed of the case. The single question in controversy was whether the defendant bank was or was not the *bona fide* holder of these debentures and entitled in good conscience and equity to retain the property in them which had passed to the bank by delivery against the plaintiff, the true owner. The burden of proving that the bank was not the *bona fide* holder lay on the plaintiff, and when the plaintiff admitted that he did not charge the defendant with fraud or dishonesty, he gave up the attempt to prove his case, and in effect abandoned his claim. Even if this admission had not been made, the evidence would hardly justify the conclusion that the defendant bank had dishonestly, and for the purpose of avoiding a knowledge of the truth, omitted to make inquiries upon the facts and matters known to it. The jury were not asked to consider and find upon this point, and they have not found upon it. The facts that Onyans was a clerk in another bank, holding a confidential position and supposed to have only a small salary and that he continued to seek for nearly a year and a half very large adavnces upon securities of great value, of which his employers were known by the defendant bank to be large holders themselves and custodians for others, were undoubtedly facts that might reasonably create uneasiness if not suspicion, and suggest inquiry. There was strong evidence in support of this view. Mr. John Curtayne, a manager of a Melbourne bank, of long experience, made the significant statement :—"If a clerk at another bank brought me debentures to advance upon them, I would prefer not to make the advances; I would make a good many inquiries before I would agree to make him an advance." The jury would naturally be influenced by such evidence. The records of our criminal courts have made the carelessness and ignorance of bank managers in reference to the reputed conduct and dealings and habits of life of a few bank *employès* from time to time a matter of common knowledge. And I would not be understood either to express dissent from the findings of the jury in this case, or as disposed to extenuate the just and weighty censure which the jury have passed upon the management of the defendant bank for its imprudent and careless dealing with the offending clerk in the matter of its advances on these debentures. But the findings do not necessarily point to more than imprudence and carelessness on the part of the defendant bank. The jury have not been asked to find, and they have not found, that which alone could invalidate the title of the defendant Bank to detain these debentures from the true owner, namely, dishonesty in wilfully shutting its eyes to known facts, and a dishonest determination not to inquire lest inquiry should lead to knowledge The defendant bank has not been proved or found to be guilty of this dishonesty, and it must therefore be treated for the purpose of this action as the *bona fide* holder of these debentures. We answer the question reserved for our determination, that in the opinion of the Full Court, notwithstanding the findings of the jury, the defendant bank is entitled to judgment.

WILLIAMS, J., read the following judgment —Before expressing my opinion upon the question reserved, viz., as to "whether, notwithstanding the findings of the jury, the defendant bank is entitled to judgment," I desire to observe at the outset that I thoroughly concur with those findings, and that there was, in my opinion, abundant evidence to support all of them. I also think it well to state that during the argument counsel for the defendant bank, in my opinion, pressed to an undue length an admission that was made at the trial, at which I presided, by Mr. Hood, counsel for the plaintiff. My note of what occurred is as follows :—"Mr. Hood admits he does not charge the defendant bank with fraud or dishonesty." Recalling what occurred at the trial, the effect of this admission was to preclude the plaintiff from contending that the defendant bank was affected by any fraud or dishonesty, or by notice or knowledge of any fraud or dishonesty in taking these debentures other than what might be considered as the legal effect of the findings of the jury upon the questions which counsel for the plaintiff desired should be submitted to them, assuming the jury to find those questions in his favour. Dealing now very shortly with the question reserved, I am of opinion that it should be answered in the affirmative; in other words, that the defendant bank is, notwithstanding the findings of the jury, entitled to judgment. Were it not for certain expressions of the learned law lords contained in the case *Earl of Sheffield v. London Joint Stock Bank*, 13 Appeal Cases, p. 333, and particularly the dicta of Lord Bramwell at pp. 345, 346, I should, having regard to the long and almost uniform current of authority upon the point submitted for our decision in this case, have had no doubt. But there are dicta in the case I have cited which do not harmonise with the long current of authority to which I have referred, and which, it may be argued, support the authority of *Gill v. Cubitt* 3, B. and C., p. 466, a case which has been considered for a long period of years as virtually overruled. Apart from the doubt which the dicta of the eminent law lords in the latest case upon this subject (*Earl of Sheffield v. London Joint Stock Bank*) necessarily suggest, I should have no hesitation in stating that upon the findings in the present case, the defendant bank is entitled to judgment. With the exception of these dicta, undoubtedly entitled to great respect, the case of *Gill v. Cubitt*, and the half-dozen cases which followed *Gill v. Cubitt*, a long and copious stream of authority, uniform with the exceptions I have mentioned, has clearly and forcibly established the principle that findings, such as those now before us, are insufficient to invalidate the title of the holder of instruments, such as those now in question, *who has given valuable consideration* for their transfer It is unnecessary to refer in detail to the authorities I

allude to, as they will all be found collected and commented on in the notes to *Miller v. Race* (1 *Smith's Leading Cases*, 9th edition, p. 517, 518, 519, and 520,) but I may be allowed to refer more particularly to the recent case of *Jones v. Gordon* (2 Appeal Cases p. 616), decided also by the House of Lords only 12 years ago. In that case the principle to which I have referred is very clearly and forcibly expressed in the judgment of Lord Blackburn, reported at p. 628, His Lordship says—"I think it is right to say that I consider it to be fully and thoroughly established that, if value be given for a bill of exchange, it is *not enough* to show that there was carelessness, negligence, or foolishness in not suspecting that the bill was wrong when there were circumstances which might have led a man to suspect that. *It is necessary* to show that the person who gave value for the bill, whether the value given be great or small, was affected with notice that there was something wrong about it, when he took it. I do not think it is necessary that he should have notice of what the particular wrong was. But I think that such evidence of carelessness or blindness as I have referred to may, with other evidence, be good evidence upon the question, which, I take it, is the real one whether he did know that there was something wrong in it. If he was honestly blundering and careless, and so took a bill or a bank note when he ought not to have taken it, still he should be entitled to recover; but if the facts and circumstances are such that the jury come to the conclusion that he was not honestly blundering and careless, but that he must have had a suspicion that there was something wrong, and that he refrained from asking questions, not because he was an honest blunderer or a stupid man, but because he thought in his own secret mind—I suspect there is something wrong, and if I ask questions and make further inquiry it will no longer be suspecting it, but my knowing it, and then I shall not be able to recover. I think that is dishonesty." Adopting, as I do, the proposition here laid down by Lord Blackburn, the facts as found by the jury in the present case do not in my opinion sustain it so as to invalidate the title of the defendant bank. Counsel for the plaintiff undoubtedly expressly admitted at the trial that, unless a finding in his favor upon the questions which at his request I submitted to the jury invalidated the title of the defendant bank to hold these debentures, he must fail. Those questions he based apparently upon Lord Bramwell's dicta in the Earl of Sheffield's case, in 13 Appeal Cases, and those dicta I must admit, appear to support the course he (counsel for the plaintiff) was content to take. But yielding, as I think I ought to, to the decision of the House of Lords in *Jones v. Gordon* (2 Appeal Cases), and to the numerous decisions which *Jones v. Gordon* followed, I am of opinion that the findings of the jury are insufficient to defeat the title of the defendant bank as holders for value of these debentures, and that therefore, notwithstanding those findings, the defendant is entitled to judgment. My brother a'Beckett desires me to state that he concurs in my judgment.

Judgment for defendants with costs.

Solicitors for plaintiff, *Malleson, England & Stewart*; Solicitors for defendants

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(Before Higinbotham C.J., Holroyd and Hood, J.J.)

CHRISTOPHERS v. THE MUTUAL STORE.

26th March

The Veterinary Surgeons Act 1887 *(No. 956) section 23—the word "person" in the first line of that section, includes a corporation.*

This was an order to review a conviction obtained by the Veterinary Board against the Mutual Store Limited, on a charge of infringing the *Veterinary Surgeons Act* 1887, by using the term veterinary in connection with the term "infirmary" in the company's business. The prosecution was instituted in the name of Henry Albert Marguis Christophers, the registrar of the Veterinary Board of Victoria. The defendant is a limited liability company, but is not registered under the *Veterinary Surgeons Act*. The defendants had published a catalogue in which a statement was published to the effect that the store had a veterinary infirmary at South Yarra. This it was contended was an infringement of the *Veterinary Surgeons Act*, which by section 23, prohibited any "person," unless registered under the act, from using the term "veterinary" in connection with any other name or business. The Mutual Store had a registered veterinary surgeon in its service at South Yarra. It was contended for the defendants that the act did not apply to the case of a corporation, but only to cases of individuals who infringed the act, and therefore that the Mutual Store could not be fined. The justices convicted the defendants, and imposed a fine of twenty shillings.

Johnston to move absolute.

Mitchell to show cause. The word person in the firstline of section 23 includes a corporation. By section 6 of the *Interpretation Act* 1857, the word "person" shall include a corporation unless there is something repugnant and inconsistent with that meaning. The policy of the *Veterinary Surgeons Act* is to prevent any person, individual or corporation, using the word "veterinary" without being registered. *The Pharmaceutical Society v. The London and Provincial Supply Association*, 5 App. Cases 857, is a decision under the English Act, and does not apply. He cited *Reg. v. Panton exparte Farmers' Produce Co.*, 14 V.L.R. 836.

Johnston in reply. The whole of section 23 must be read to find the meaning of the word person. In other portions of the section the word person cannot include a corporation, and it must be taken to have the same meaning all through. He cited *Shillinglaw v. The Equitable Co-operative Co.*, 12 V.L.R. 898.

HIGINBOTHAM, C.J.—The ground of the order *nisi* to review the conviction by the justices is as follows:—That the defendant, being a corporation, could not be fined under the Veterinary Surgeons Act 1887. The defendant was a corporation, and was charged

under the earlier part of the Veterinary Surgeons Act with having used the term "veterinary" in connection with the word "infirmary" contrary to the statute. In the Veterinary Surgeons Act it is provided in section 23 that it shall not be lawful for any person, unless registered under the Act, to pretend to be or take, or use the name of veterinary surgeon or veterinary practitioner, or use the term "veterinary" in connection with any other name or business, or to use any other name, title, addition, or description, &c., implying that he was a fellow or licentiate of any veterinary school or college, unless he proved to the satisfaction of the board that he was entitled to such description. We think this act ought to be read as though the words of the 6th section of the Interpretation Statute were put in the Interpretation clause of the Veterinary Surgeons Act, as if there was a preliminary section in this act, which stated that the word "person," where it occurred in the act, shall include a corporation unless there be something repugnant or inconsistent with this meaning. Now, under such a section as that in the act how does the case stand? The Act is, according to the preamble, to enable persons, that is the public, requiring the aid of a veterinary surgeon for the cure or prevention of diseases or injuries to horses or other animals, to distinguish between qualified and unqualified practitioners. It goes on to establish a veterinary board, invested with certain powers, and charged with certain duties. Among others it has the duty of causing names of all certified persons by the board as duly qualified for registration as registered veterinary surgeons to be registered and the board is required to keep a register of such persons, with their respective residences and a description of their respective qualifications. They are to be persons who held certain diplomas, or who, prior to the act, have practised in Victoria for a certain time as veterinary surgeons or who have been veterinary students in some school or college recognised by the board under regulations made under the act, and have passed certain examinations in the subjects required for the purpose of the business. It then proceeds to guard against attempts made by unqualified and unregistered persons to deceive the public, by representing themselves as qualified veterinary surgeons. In the first part of section 23 it is provided that "it shall not be lawful for any person, unless registered under this act, to pretend to be, or take, or use the name of veterinary surgeon, or veterinary practitioner, or use the term "veterinary" in connection with any other name or business," and having regard to the object of this section there is nothing in the first clause repugnant or inconsistent with the word "person" including a corporation, and though it may and ought to be conceded that the second offence referred to in this section could only be committed by an individual, and not by a corporation. We must deal with each offence for the purpose of this argument by itself. If there is nothing repugnant to or inconsistent with the including of a corporation in the word person in this clause of the act, then it was the clear intention of the Legislature that it should be included. The real object of the section appears to be to prohibit everything done by anyone which would be calculated to create a false impression as to his qualification without being registered. Primarily that would apply to persons practising this business. But the language of the section includes others who are not individuals, but who are corporations, and who attempt to practise this business, but who are not registered and who could not be qualified. We think that the defendants, although a corporation, were subject to the act, and have committed an offence under the act. The rule to review the decision of the justices will be discharged with costs.

HOLROYD, J. I concur. I should test the question in this way. Supposing the section were to run thus:—"No individual or corporation shall commit any of the following offences;" and then several offences were enumerated, some of which could be committed by a corporation, some which it was not possible for a corporation to commit, some which might be committed by an individual, and some which an individual could not commit. That would be perfectly good sense, and good English. Then if the words "no person" were substituted for "no individual or corporation," there would be nothing repugnant or inconsistent in holding that the word "person" applied to a corporation, as well as to an individual.

Hood J.—The chief object of the Veterinary Act is to prevent unregistered persons from carrying on the veterinary business. If so, it apparently prevents a corporation from being registered. Apart from the Interpretation Statute, I should say there was great force in the argument for the defendants. But that section amounted to this—that in interpreting an act of Parliament the word "person" must be read to include a corporation, unless that reading was repugnant to or inconsistent with the meaning of the act. A corporation is only excluded where it would lead to inconsistency to include it. If it were applied to this section there are some offences which a corporation could not commit, and others which it could and did commit. *Order to review discharged with costs.*

Solicitors for complainant *Briggs and Snowball.*
Solicitors for defendant *Blake and Riggall.*

(Before Higinbotham, C.J., Holroyd, and Hood, J.J.)

FOULDS v. BEAVIS.

The Police Offences Statute 1865 (*No.* 265) *s.* 7—*Breach of condition of licence—Order to review—Evidence too uncertain to warrant conviction—Semble, whether the cementing of a building already erected comes within the meaning of the words "when a building is being erected" or not depends on whether the cementing was contained in the original design.*

This was an application by order to review to quash a conviction against George Beavis, a contractor, for

not complying with certain conditions of a licence issued to him by the council of the city of South Melbourne. The information was laid by George Foulds, an officer of the South Melbourne Corporation, and it charged Mr. Beavis with not complying with the conditions of a licence issued to him by the council of South Melbourne in not erecting a temporary verandah on a building then in the course of erection. The justices convicted the defendant and he was fined £5, with £2 2s. costs. The offence was said to have been committed on the 23rd August 1889. The defendant was engaged in cementing the front of the Falls-bridge Hotel, and had a permit for building purposes, but he had not erected a temporary verandah. The sixth condition of the licence issued to the defendant was as follows :—"That when a building is being erected in a line with a street protection to passers-by must be made by the erection of a temporary verandah and proper hoardings constructed." It appeared that the hotel had been erected and occupied some months before, but the work being done by the defendant was the cementing of the outside of the building. A licence had been obtained for the hotel in October, 1888. It was submitted that the cementing of the hotel formed no part of its erection, and that the sixth condition of the licence therefore did not apply to the case, as the defendant was not erecting the building. The justices overruled the objection and convicted the defendant.

Mitchell to move absolute

Box to show cause. The information was laid under Sec. 7 of the Police Offences Statute. The object in the condition is to protect passers-by while the erection is being completed. Erection does not merely mean raising the bare walls. (*Hood*, J. : I think the time of erection lasts till the original design is completed.)

Mitchell in reply—The offence charged has not been proved. There is nothing in evidence to show whether the building was being erected or not when the alleged offence was committed. The onus of proof lies on the prosecution.

Per curiam. There was no evidence to justify the conviction against the defendant for building contrary to conditions of the licence issued to him. The terms of the sixth condition are very distinct, and confine the obligations of the contractor to the time when the building was being erected. It is a matter of conjecture, under the circumstances of the case, whether the building had not been erected when the defendant proceeded to do the cement work. The original building had been erected in a certain sense nearly a year before. This might or might not have been part of the original design. If it was part of the plan on which it was to have been erected, it seems to be work to be done when the building was being erected. If it was distinct from work contained in the original design, it would be extra work. The evidence is left too uncertain to justify a conviction upon it. We do not place too strict a meaning on this licence, still less express an opinion that provision should not be made in the licence where additions, improvements, or repairs are made to the front part of a building abutting on a public street. Here that provision has not been made. The order to review will be made absolute, with costs, and the conviction will be quashed, with costs.

Order to review the decision of the justices made absolute with costs.

Solicitor for informant, *Gillott*; Solicitor for defendant, *Herald*

(Before Higinbotham, C.J., Holroyd and Hood, J.J.)

RATTRAY v. ROACH.

March 25th.

Admissions in criminal proceedings — prosecution under the Licensing Act 1885 *(No. 857) section* 134. *Order to review—On the hearing before the Justices defendant by his counsel admitted all the facts complained of in the information but contended he was protected by a brewer's license. On these admissions and by consent, without taking any evidence, the Justices decided the case and dismissed the summons. Held, that in criminal proceedings the party charged can consent to nothing, and therefore his admissions could not be evidence.*

The Attorney-General v. Bertrand, L.R. 1 P.C. 520.

Allowed order to review.

The Defendant was charged before the Justices with selling beer without a licence contrary to the provisions of 134th section of *The Licensing Act*, 1885. It appeared from the affidavits that the defendant who held a brewer's licence and whose registered premises were at Warrenheip had also a depot at Scarsdale where he sold his beer through an agent, and it was for selling beer at Scarsdale he was charged with this offence. On the case coming on he admitted through his counsel that he had sold the beer as alleged in quantities not less than two gallons, but contended that under his brewer's licence (which it was admitted he held) he could sell beer at any place in the colony in quantities of not less than two gallons. These admitted facts were put in writing and submitted to the Bench and by consent no other evidence was taken. The Justices thereupon dismissed the information, and this order was now sought to be reviewed.

Box to move the order absolute.

Finlayson to show cause, read the affidavits.

(HOOD, J.—This is a criminal proceeding. Had the Justices power to act on admissions).

Box—Both parties are agreeable that this case should be heard on admissions. It is a test case to settle a point of law.

THE CHIEF JUSTICE.—The case of *Regina v. Bertrand* L.R. 1 P.C. 520, which has always been followed is an authority that a prisoner can consent to nothing. We cannot Act on admissions.

Per Curiam.—The order will be discharged without costs.

Solicitor for informant, *Crown Solicitor*; solicitor for the defendant, *Mann*.

IN CHAMBERS.

(Before Hood J.)

LONDON DISCOUNT AND MORTGAGE BANK v. DAISH AND ORS.

19th, 22nd May.

Rules of Supreme Court Order IX r. 2—Substituted service—Application for leave to substitute service of the writ refused where it was not shown that there would be some reasonable probability of the method proposed to be adopted bringing knowledge of the writ to the defendant—Where defendant is absent from the colony and is expected to return within two months, there being no pretence that he is seeking to evade service, an order for substituted service will not be granted—Quære—Whether Order IX r. 2 would extend to allowing substituted service of an ordinary writ against a defendant then out of the jurisdiction.

Application on behalf of the plaintiffs under Order IX r. 2 for an order for substituted service of the writ of summons in the action upon the defendants Bradly & Hulls.

Mr. Weigall in support.

The facts and argument appear sufficiently from the judgment.

HIS HONOR said—I will consider the matter.

HIS HONOR on a subsequent day read the following judgment:—An application, supported by affidavits, has been made to me in this case under order IX rule 2 for an order for substituted service of the writ upon two of the defendants, Frederick James Bradly and Charles Henry Hulls. The writ was issued on the 26th March, 1890, and the action is brought for the rescission of a contract of sale of land between the plaintiffs and the defendants. The defendant Bradly was a solicitor, and acted as such for the other defendants, and in the month of May, 1889, he absconded from his creditors, his present address being unknown. The object of all service of writs is to give notice to the party, in order that he may appear and resist that which is sought against him (per Ld. Cranworth, L.C. in *Hope v. Hope*, 23 L.J., Ch., at p. 685), and therefore, in ordering substituted service, there should be some reasonable probability that the method adopted may bring knowledge of the writ to the defendant (*Furber v. King*, 29 W.R., 535, and *Wolverhampton Banking Company v. Bond*, 29 W.R., 599). There is here no suggestion that the method asked for, viz., the publication of advertisements in the newspapers, would probably bring the matter under Bradly's notice, nor is it urged that he absconded to avoid service of this or of any writ. It is not stated that there is any person here who could or would defend the action for him, or through whom any intimation of these proceedings would be likely to reach him. Even if a man has absconded he may have a defence and is entitled to have an opportunity of being heard. I therefor think that I ought not to make this order as to Bradly. With regard to the other defendant (Hulls), it is sworn that he was in Melbourne in January last, but left for England, and his present address is unknown to the plaintiffs. It appears that he has left a power of attorney to his sons, authorising them to defend any actions that may be brought against him, and an order is sought for service on one of them. The only information that the plaintiffs have obtained with regard to this defendant is that he is in England, and will return in two months. I doubt if order IX, rule 2, would extend to allowing substituted service of an ordinary writ against a defendant then out of the jurisdiction (see *Fry v. Moore*, 23 Q.B.D., 395), though the contrary view has been expressed by a'Beckett, J. (see *Flower v. Fox*, 10 A.L.T., 109; *Moubray v. Riordan*, 15 V.L.R., 354). But I refuse this application on the ground that there is no pretence that this defendant is evading service, and he is apparently about to return (*Alder v. Benjamin*, 1 *Times* rep. 308), and if any order were granted, the defendant, under the circumstances, ought to have such an extended time for appearance that the plaintiff would not gain anything in time by this proceeding. I was urged to grant this application on account of the injury which might occur to the plaintiffs if I refuse. I was pressed by this argument, but the answer is clear. A refusal causes the plaintiffs trouble and delay, which may be remedied, and if I have wrongly refused, they can appeal. On the other hand, a defendant might be fatally prejudiced, and the right of appeal would come too late to be more than a mockery to him.

Application for leave to substitute service of the writ refused.

Solicitors for plaintiff, *Parey, Wilson, & Cohen.*

(Before Hood, J.)

STRONG v. TAYLOR.

22nd May.

Justices of the Peace Act 1887 (*No.* 953) *s.s.* 155,157—*Review of taxation—Appeal—Costs of appeal and of the court below—Sec.* 157 *applies to costs of the court below as well as to the costs of the order nisi.*

Review of Taxation.

In a complaint before the Court of Petty Sessions at Footscray the magistrates found in favor of the complainant Strong. The defendant Taylor obtained an order for review under sec. 150 of *The Justices of the Peace Act* 1887. On the return of the order *nisi* the Full Court made the order *nisi* absolute, and further ordered that the costs of Taylor on the complaint and his costs of the review be taxed and paid by Strong. On the taxation the Prothonotary taxed Taylor's costs of the complaint and of the review at a sum greater than £20. The respondent Strong then took out a summons for a review of the taxation on the ground that under sec. 157 of *The Justices of the Peace Act* 1887 no greater sum than £20 could be allowed for the successful parties costs.

It was contended in support that sec. 157 governed the matter. That section provides that "The Full Court may make such order as to costs as it deems just. Provided that in no case shall costs exceeding L20 be allowed to any party." This confers the power to give costs and gives the Full Court a discretion as to the costs but it limits their powers. Section 155 which shows what the Full Court may do, makes no mention of costs and therefore that section does not apply because as the section does not give the Court power to award costs no costs can be given. *The Justices of the Peace Statute* 1865 sec. 155 provided that "no greater sum than L20 should be allowed as costs to the appellant (if successful) in any appeal to the Supreme Court, and that section was always acted upon as providing for the costs of the proceedings in the Court below as well as of the appeal. Where the legislature has intended that the Full Court should have unlimited powers as to the costs of the appeal and of the Court below it has so provided for by sec. 120 of *The County Court Statute* 1869 it is provided that the Full Court "may make such order with respect to the costs of the said appeal and of the action suit matter or proceeding in which the judgment decree or order shall have been made as such Court may think proper."

It was contended to oppose that sec. 157 of *The Justices of the Peace Act* 1887 applied only to the costs of the appeal.

[His Honor. If that be so where do the Full Court get power to deal with the costs of the Court below ?]

Order LXV r. 1 gives them the power.

His Honor. That rule does not give jurisdiction to give costs ; it merely gives them a discretion as to how they will exercise that power. These costs are not costs incident to the proceedings in the Court, for they are costs of the proceedings in the Court of Petty Sessions.

Sec. 155 gives the Full Court power to make any other order as may seem just; that would give power to deal with the costs of the Court below.

His Honor said. I was at first inclined to think that sec. 157 dealt only with the costs of the order *nisi* and that the officer was right in taxing the costs at over L20 in as much as by section 155 the Full Court are given power to make any other order as may seem just and that therefore sec. 157 could be taken to apply only to the costs of the order *nisi ;* but on consideration I think that the power given by sec. 155 relates on'y to the subject matter of the dispute and not to the costs. I think there has been a mistake made in the drafting of sec. 157 for in my opinion it was never intended that that section should apply to the costs of the Court below as well as of the order *nisi*, but that is a question for the legislature and not for me. The section provides that "in no case shall costs exceeding L20 be allowed to any party" and by that I must be bound. I therefore allow the application with L1 1s. 0d. costs.

Solicitors for appellant *Strongman* and *Crawford :* for respondent *Gillott, Croker, Snowden* and *Co.*

(Before Hood, J.)

PRICE v. SANTLEY.

——— 23rd and 27th May.

Rules of Supreme Court Order XIX r.r. 6, 7—*Malicious prosecution—Denial of each and every allegation in the Statement of Claim—Particulars—Where, to an action for malicious prosecution, the defendant denied each and every allegation in the Statement of Claim, he was ordered to give particulars of his reasonable and probable cause for instituting the proceedings.*

Application on behalf of the plaintiff for an order that the defendant should give particulars of the facts from which the defendant alleges that he had reasonable cause for instituting the proceedings complained of in the statement of claim.

The action was for maliciously and without reasonable and probable cause preferring a criminal charge of embezzlement against the plaintiff, which charge was heard in Sydney, N.S.W. and dismissed.

The defendant pleaded a denial of each and every allegation in the statement of claim.

Mr. Isaacs in support referred to *Spedding v. Fitzpatrick* 38 Ch. D. 410; and *Cave v. Torre*, 54, L.T.R. 87, 515.

Mr. Leon to oppose cited *Roberts v. Owen*, L.T.J., 1889, pg. 119.

His Honor said I will consider the matter.

His Honor on a subsequent day read the following judgment :—The statement of claim in this case is for maliciously and without reasonable and probable cause preferring a criminal charge against the plaintiff. The defendant pleaded a denial of each and every allegation in the statement of claim, and the plaintiff has taken out a summons for an order for particulars "of the facts from which the defendant alleges that he had reasonable cause for instituting the proceedings complained of in the statement of claim." Strictly speaking this summons is inaccurate for the defendant by his defence does not allege anything. He merely puts the plaintiff to proof of everything stated in the claim. He does not say that he had reasonable cause but relies upon the plaintiff's inability to prove that he had not. I think, however, that it would be a violation of the spirit of the present procedure if I were to deal with this application on a point of form instead of on its substance. The real dispute between the parties is as to whether or not the defendant can be compelled to furnish any information to the plaintiff of the probable defence to this action, either as necessary particulars under order XIX, rule 6, or as a further and better statement of the nature of the defence under order XIX, rule 7, and I intend to deal with this application in that aspect. It was contended for the defendant that in an action for malicious prosecution no order for particulars will be made relating to reasonable and probable cause and a case of *Roberts v. Owen*, reported in the *Law Times* journal, December 14th 1889, at page 119 was cited

in support. There such particulars were refused upon pleadings similar to the present ones. The report is extremely short. No reasons are given for the judgment, and I cannot think that it was intended for more than a decision upon the facts of that particular case. If the case is to be considered as laying down any general rule I do not feel bound to follow it, for I do not see any difference in principle between actions for malicious prosecution and any other action. The whole object both of pleadings and particulars is to save expense and to narrow down the matters in dispute, and to prevent either party from being taken by surprise by his opponent's case at the trial. I think that a plaintiff in malicious prosecution is justified in asking for the fullest information from the defendant. The burden is on the plaintiff of proving a negative by the absence of probable cause, and that burden is increased when it is remembered that what he has to prove are facts from which an inference has to be drawn as to the state of the defendant's mind. The facts as known to the plaintiff and the inference to be drawn from them may be entirely displaced by evidence on defendant's part of additional matters operating upon defendant's mind and constituting probable cause, such matters being wholly unknown to the plaintiff. I think that this consideration shows not only that the plaintiff is entitled to particulars in an action for malicious prosecution, but also that he is so entitled, even when the defendant, as here, pleads a simple denial, otherwise at the trial the defendant may disclose some fact which would defeat the plaintiff, who, with previous knowledge thereof, might never have brought or continued this action. I will therefore make an order either as asked or for a further and better statement of the nature of the defence, with costs three guineas, and certify for counsel.

Solicitors for plaintiff, *Eggleston, Derham & Martin;* for defendant, *Blake & Riggall.*

(Before Hood, J.)

RE THE SWITCHBACK RAILWAY AND OUTDOOR AMUSEMENT COY., LIMITED, EX PARTE HAYDON AND MOUNT.

27th, 29th May.

Companies Statute 1864 *(No.* 190) *s.s.* 21, 68—*Table A*, Arts. 8, 9—*Winding up Company—List of contributories—A contributory is a person who has agreed to become a member of a company without signing his name to a transfer, if he has been treated as a shareholder by the company and has acted as a shareholder. A transferree of a share is not entitled to escape liability because he has never signed the transfer—A shareholder who has paid off a debt due by the company with the acquiescence of the directors is entitled to credit for the amount so paid as against the liability on his shares.*

Application on behalf of the liquidator of The Switchback Railway &c. Coy. to settle the list of contributories.

The liquidator had placed the names of Haydon and Mount on the list of shareholders of the Company. On the application of the liquidator to settle the list of contributories, Haydon objected to his name being thereon, on the ground that he had never signed the transfer he obtained from the person from whom he purchased the share. Mount objected on the ground that he had paid his shares fully up by paying a debt of L75 due by the Company, and the directors had resolved that this sum should be paid on the shares.

Mr. McCutcheon for the liquidator.

Mr. Irvine for Haydon.

Mr. Cole for Mount.

HIS HONOR said: I will consider the matter.

HIS HONOR, on a subsequent day, read the following judgment:—

Haydon's Case.

Upon the application of the liquidator of the above Company to settle the list of contributories, Mr. Thomas Haydon has objected to his name being thereon, on the ground that he is not a shareholder, although his name is on the register. In October, 1889, Mr. Haydon purchased and paid for one share in the company, and received a certificate, with a transfer endorsed, signed by the transferror. This certificate he has retained ever since, but has never signed the transfer himself. His name was placed upon a committee list without his knowledge, but he subsequently agreed to act thereon. He received notices of the meetings of the company but did not attend. He now alleges that he was induced to buy the share by misrepresentations, but he has never taken any steps to repudiate the contract, or to have his name removed from the register of members. It is contended on his behalf that he is entitled to escape liability, because he has never signed the transfer, and, therefore, there has been no compliance with articles 8 and 9 of table A to the Companies Statute 1864, which admittedly apply to this case, and which provide for the transfer being signed by both parties. In my opinion this contention cannot be supported. The effect of secs. 68 and 21 of the Companies Statute is that a contributory is a person who has agreed to become a member of the company, and whose name is upon the register. There is no principle of law which says that a man cannot become a shareholder in a company without signing his name to a transfer (*Cunningham v. City of Glasgow Bank* 4 Ap. C. p. 614), and if the company has accepted the transfer, it does not matter whether the instrument was irregular or not (*In re International Company* 37 L.J., ch. 292, *re General Floating Company*, Weekly Notes, 1867 p. 27). A person may become a shareholder without complying with all the formalities, and if he has been treated as a shareholder by the company and has acted as a shareholder, then both he and the company will be estopped from denying that he is a shareholder (*Lindley*, 5th ed. 48). On the facts I am satisfied that

Mr. Haydon did agree to become a member, and it is plain that he has hitherto acted upon that view himself. Having agreed to become a member, and having retained the scrip and transfer with knowledge that the company regarded him as a member, so that he could have claimed any benefit that might have accrued if the company had been successful, he ought not now to be allowed to escape liability to the creditors simply by reason of his own act in not complying with the requisite forms. In an affidavit filed in this matter, Mr. Haydon has alleged that he was induced to buy the share by misrepresentation, but though he was called as a witness, he was neither examined nor cross-examined on this point, nor was any other evidence given about it, and very little was said on the subject in argument. I certainly would not be prepared on such materials to find that he was deceived, but in any event I think it is too late after winding-up has commenced to open up this matter as against the liquidator. I can see no distinction in principle between this case and those of *Oakes v. Turquand* (L.R. 2 E. and I. Ap. 325) and *Oakes v. Overend*, (L.R. 3, Eq. 576.) I therefore overrule Mr. Haydon's objections, and his name must remain on the list, and I allow the liquidator two guineas costs as against him.

MOUNT'S CASE.

Upon the same application Mr. L. L. Mount also objected to his name being on the list, Mr. Mount admits that he is a shareholder, but he says (1) That he is registered for six shares instead of five, and (2) That he has paid up in full for those five. The first ground was conceded by the liquidator, who has in fact only put Mr. Mount on the list for five shares. The facts as to the second ground are that Mr. Mount was prior to the 6th January, 1890, sued by a creditor of the company for the sum of L75. Apparently the money was owing, though not by Mr. Mount personally, and it was agreed between him and the directors of the company that he should pay the amount claimed and be credited with such payment in lieu of any further calls. Mr. Mount paid the money, and on the 6th January, 1890, the directors passed a resolution duly entered in the minute-book, embodying the agreement arrived at. This payment of L75 would, if allowed, cover all the unpaid amount for which Mr. Mount is liable, and it is contended that he is entitled to take credit for that sum, and that his name should not be kept upon the list of contributories. Upon these bare facts I think this contention is correct, and that the case is governed by the reasoning in Poole's Case (9 Ch. D. 322.) It was there held that directors who paid off a debt due by their Company were entitled, upon a winding-up, to credit for the amount so paid, even though they had paid the money to relieve themselves from their personal guarantee to the bank, and the company was at that time virtually insolvent. I think, therefore, Mr. Mount is entitled to have his name taken off the list, and I so order; and as all the facts were disclosed by him to the liquidator before any proceedings were commenced, I allow him his costs, three guineas.

Solicitors for liquidator, *McCutcheon and Bruce*; for Haydon, *Casey and O'Halloran*; for Mount, *Darvall & Horsfall.*

SITTINGS IN BANCO.

(Before Higinbotham, C.J., Holroyd and Hood, J.J.)

BRECKWOLDT v. THE COLONIAL GUANO COMPANY Limited.

March 14.

Breach of charter-party—"representation" or "condition precedent." The words in a charter-party describing a vessel as "now lying at the Port of Cape Town" may be either a representation or a condition precedent and it is permissible to look at the surrounding circumstances to construe their real meaning—The party intending to rely upon such words in a charter-party as constituting a condition precedent must plead and prove that such words constitute a material part of the contract or must plead and prove facts from which it results that such words are a material part of the contract.

Question reserved by Holroyd, J., for the consideration of the Full Court.

This was an action to recover damages for breach of a charter-party. It was agreed between the parties that a vessel called the Pioneer "now lying at the Port of Cape Town, in South Africa," should, before a certain day sail for Jones' Island and there load a "full and complete cargo of guano." At the time the charter-party was entered into the vessel was not lying at Cape Town, but at Port Elizabeth. Shortly after she sailed for Jones' Island, and there, owing as the plaintiff alleges to the fault of the defendant, the vessel was unable to load a full cargo of guano. One of the defences raised at the trial was that as the Pioneer was not at the port of Cape Town at the time the charter-party was entered into, the plaintiff was not entitled to recover. The jury found for the plaintiff, but the learned judge reserved for the consideration of the Full Court the question whether the fact that the ship Pioneer was not lying at Cape Town when the charter-party was entered into was a good answer to the action.

Mitchell (with him *Cumbrae-Stewart*) for plaintiff.—In construing a contract where the words though clear may under certain circumstances mean one thing and under other circumstances mean something different, the Court will look at the surrounding circumstances to see what is really meant. The words relied on in this charter-party do not constitute a condition precedent. The words are mere matter of description. The question is—what was the intention of the parties? The defendant must plead and prove that these words constitute a condition precedent. The Court will regard the finding of the Court below. *Behn v. Burness* 1 B. & S. 877; *Oppenheim v. Fraser*, 34 L.T. 524; *Corkling v. Massey*, L.R. 8 C.P. 395.

Moreover, mercantile instruments such as charter-parties will not receive an unnecessarily strict construction, but the Court will look to the objects of the contract and regard the obvious intention of the parties, *Dimech v. Corlett*, 12 Moo. P.C. 199.

Box for defendant.—The words are clear and the Court will not go outside the contract itself in order to determine what is meant by its terms. The words form an essential and material part of the contract: it is for the plaintiff to prove that they do not. It is admitted that the vessel was not at Cape Town when the contract was made.

Hood, J.—Even if the words are clear how can the Court determine whether the words are a condition precedent or a representation, unless we look at the surrounding circumstances.

Box.—The Court will look at the contract alone. It might be the defendants would not have entered into the contract at all had they known that the vessel was not at Cape Town when the contract was made. In *Behn v. Burness*, 32 L.J., Q.B., 204, similar words were held to be a condition precedent. The same words in two contracts cannot mean different things, but must mean the same thing.

Mitchell in reply cited *Elliot v. Von Glehn*, 13 Q.B.D. 632.

C. A. V.
March 17th.

HIGINBOTHAM C.J. The question the Court is called on to decide is whether the fact that the ship Pioneer was not lying at Cape Town when the charter party was entered into was a good defence to the action. The answer must be in the negative. The question whether it is an answer to the action depends on the obligation of the party who set it up as an answer to the action. In this case the defendant has set up as an answer to the action, which was an action by a shipowner against the charterers for not lading the ship, that the ship was not at the Port of Cape Town at the time the charter party was entered into. It was contended for the defendant that the Court was bound to look at the contract itself, and to the contract alone, and that it was not at liberty to construe the words in it by looking at any external circumstances whatever for the purpose of forming a judgment as to whether these words were words of description only or whether they constituted a condition precedent to the contract. We think that the cases clearly show that surrounding circumstances might, and in some cases must, be taken into consideration in dealing with that question. In this case it lay upon the defendants, either from the contract itself, or from the surrounding circumstances to show that the statement that the ship was at a particular place when the contract was made was a statement which constituted a condition precedent the performance of which was necessary to entitle the plaintiff to recover. Looking at the contract itself, it appears that the parties have not stated any time at which the ship should sail from this place to the port where the cargo was to be loaded nor did the contract state any time at which the ship should arrive at the place where the cargo was to be loaded. Judging from these omissions, and they are the only two elements on which an opinion can be formed, we are of opinion that the parties did not consider it of any importance that this ship should be taking cargo at any particular time, and that it was a matter of indifference to them where she was when the contract was made—beyond this, that the cargo should be taken a reasonable time after the contract was made. Ordinarily speaking the place where the ship was is a matter of indifference, the real matter of importance being the time at which the ship was to arrive at the port of loading the cargo, and only in that aspect is it of importance where the ship was. The defendant on whom the burden of proof lay, has not been able to show anything in the contract itself or the character of the cargo or the season of the year or anything else to indicate that it was a matter of importance where the ship was when the contract was made. Therefore we think, that the defendant, on whom the burden of proof had fallen, failed to show that these words, which might be words of description or of warranty, were words of warranty.

HOLROYD, J.: The defendant, wishing to take advantage of the expression in the charter party, "now lying at the port of Cape Town," as a condition precedent, was bound to plead and to prove that it constituted a material part of the contract, or to plead and to prove facts from which it resulted that it was a material part of the contract. By producing the contract itself he might, if the Court had been of that opinion, have thrown the burden of proving that the words were not a condition precedent on the other side, because from the contract itself they might have appeared to be so, and then the plaintiff might have shown surrounding circumstances which altered the construction of the contract. In this case it is at least doubtful whether the words are merely a representation as to where the ship was, or a condition precedent. If so, it lay upon the defendant to show surrounding circumstances to put that construction on the contract for which he contended. It has been said by Mr. Box for the defendant that the same words in two different contracts cannot mean two different things, that the same words in two contracts must mean the same thing. I do not agree with that. I think that if the circumstances under which the contracts are entered into and the position of the parties are regarded the same words may mean two totally opposite things. For the construction of every written instrument it is permissible to look at surrounding circumstances for the purpose of construing the meaning of the language. Here the language is plain, but the words in the contract are capable of constituting either a representation only or a condition precedent, and it might be impossible to spell out the real meaning without looking at the extrinsic facts.

HOOD, J.—I would only add that the case of *Behn v. Burness* puts the defendant in a dilemma. *Crompton and Mellor J.J.* in the Court below thought similar words to be mere words of description. The court above, on looking at the facts, came to a different conclusion, so the defendant must fail in either case.

Question reserved answered in favour of the plaintiff.

Solicitors for plaintiff *Brahe & Gair;* for defendant *Gillott.*

IN CHAMBERS.

(Before Holroyd J.)

BARRETT v. HAUGHTON.

——— 3rd, 10th June.

Rules of Supreme Court 1884 *Order XXVII rr.* 4, 11—*In an action for specific performance of a contract, or in the alternative damages, the plaintiff cannot, in the absence of a defence, abandon his claim for specific performance and enter judgment for damages only under XXVII r.* 4, *he should place the action in the list as provided by r.* 11

Application on behalf of the defendant to set aside an interlocutory judgment by the plaintiff.

The facts appear sufficiently from the judgment.

Mr. Beckett in support. The plaintiff has abandoned his claim for specific performance; he cannot by this process enter interlocutory judgment and set down the action for assessment of damages without giving notice to the defendant. The defendant should have been given an opportunity of appearing. The proceedings should have been taken under order XXVII r. 11 which provides that judgment on default of delivery of defence must be obtained on motion. None of the preceding rules of Order XXVII apply to an action in this form. There is no form given by the rules which justifies the joinder of a claim for damages with a claim for specific performance App. C. Sec. 2 No. 12 gives the form to be used in actions for specific performance. He referred to *Tacon v. National Land Coy.* 56 L.T. (N.S. 165).

Mr. Weigall to oppose. The claim is in the alternative and there is nothing to prevent the plaintiff from claiming either specific performance or damages for breach of the contract. If the plaintiff desired to get judgment on the claim for specific performance he would have to proceed by way of motion under r. 11 of Order XXVII. The plaintiff was at liberty to abandon his claim for specific performance and ask for damages. Rules 4 and 5 of Order XXVII are applicable to cases where the claim is for damages and are not confined to claims to actions were the claim is for detention of goods or for damages arising out of such detention. They apply to all actions in which pecuniary damages are claimed. The interlocutory judgment may be therefore at once entered and the cause set down for assessment of damages.

HIS HONOR said I will consider the matter.

HIS HONOR on a subsequent day read the following judgment:—

On the 18th of April last the writ in this action was issued and served, and a statement of claim delivered therewith. An appearance was entered for the defendant, but the defendant did not deliver a defence within due time, and had not delivered any up to the date of his affidavit, 27th of May, 1890. On the 17th of May the plaintiff without notice to the defendant entered an interlocutory judgment for damages to be assessed. On the 22nd of May the action was set down for assessment of damages by a jury, and notice thereof was given to the defendant's solicitor on the following day. The object of the present application is to set aside the judgment and notice of inquiry for assessment of damages on several grounds set out in the summons, one of which is that the judgment not having been entered in pursuance of a notice of motion was irregular and bad. The action was brought on a contract by which the defendant agreed to purchase certain land from the plaintiff. The plaintiff claimed specific performance of the contract, and alternatively L500 damages for the defendants alleged breach of it. The plaintiff relied on rule 4 of Order XXVII. which so far as material is as follows: "If the plaintiff's claim be for detention of goods and pecuniary damages or either of them and the defendant makes default as mentioned in rule 2',' (*i.e.* if he does not deliver a defence within the time allowed for that purpose) "the plaintiff may enter an interlocutory judgment against the defendant and the value of the goods and the damages or the damages only as the case may be, shall be assessed by a jury." Assuming as contended by Mr. Weigall, that the pecuniary damages mentioned in rule 4 are not limited to damages for the detention of goods, but include damages for any cause for which an action for damages will lie, I must decide whether the plaintiff's claim was for pecuniary damages only. If it was not, he should have proceeded under the 11th rule of order XXVII to set down the action on motion for judgment, and such judgment would then have been given as upon the statement of claim the Court considered the plaintiff entitled to. Having claimed relief in the alternative, the plaintiff in the absence of any defence considered himself at liberty to abandon his claim for specific performance and to enter judgment for damages, as if he had claimed pecuniary damages only. In that I think he was wrong. What did his alternative claim mean? It meant, I think this—"Give me my equitable remedy, if I am entitled to it, but, if not, give me my common law remedy, "damages for breach of the contract." Under our old practice, before the Judicature Act, a plaintiff seeking specific performance would have been obliged to seal his bill in Equity, praying for that particular form of relief; and, if he established a fit case for the exercise of the equitable jurisdiction of the Court, his prayer would have been granted; or, failing that, the Court might have dismissed his bill with or without costs and left him to his common law remedy. Under

the new system, when a breach of contract for the sale or purchase of land has been committed, the plaintiff, as before, may content himself with suing for damages, and need not ask for equitable relief. If he seeks equitable relief, and for any cause the Court declines to grant it, he may nevertheless recover damages for the breach of contract in the same action. But when specific performance is prayed, the claim in my opinion is one for specific performance, and not for pecuniary damages only, though they be claimed in the alternative. The present objection has been sustained, and it is a substantial one. In an action of this kind the statement of claim might show on its face that the plaintiff was entitled to specific performance upon terms offered by the defendant or which the defendant had been willing to concede, but that equity would not permit him to obtain damages. Again the Statement of Claim might show that the plaintiff was entitled in equity to specific performance of the contract, and that, if he had brought an action for damages for breach of contract simply, his claim could not have been resisted on equitable grounds; but it might appear at the same time that it would be fairer to the defendant to grant the plaintiff the equitable remedy which he claimed first. Other instances might be given.

I set aside the judgment, and allow the defendant three days from this date to deliver a defence. I shall not extend the time again. The defendant has not assigned a sufficient reason for failing to deliver his defence, and I therefore give him no costs.

Solicitors, for plaintiff, *Simpson*, for defendant, *Abbott, Eales and Beckett.*

PRACTICE COURT.

(Before Hood, J.)

REES AND OTHERS v. CARROLL AND OTHERS.

28th May, 9th June

Mining Statute 1862 (*No.* 291) *Sec.* 212—*Sch.* 29—*Notice of Appeal from Warden to Court of Mines—Form of Notice—Literal compliance with the form given in Sch.* 29 *is not requisite—Failure to fill up the blank left in the form for the insertion of the name of the place at which the proceedings had been heard by the Warden does not make the notice of appeal bad.*

Rule *nisi* for a mandamus to compel the Court of Mines of the district of Beechworth to hear and determine an appeal from the Warden of Goldfields of the same district.

The facts and arguments appear sufficiently from the judgment.

Mr. MacDermott and *Mr. Power* moved the rule absolute.

Mr. Helm showed cause,

HIS HONOR said, I will consider the matter.

HIS HONOR on a subsequent day read the following judgment:—On the 1st March 1890 a complaint was heard between the above parties before a Goldfields Warden sitting at Beechworth and an order made in favour of the complainants. The defendants duly gave notice of appeal under section 212 of the Mining Statute No. 291 to the Court of Mines for the district, but when the appeal came on for hearing, an objection was taken to the form of the notice of appeal, and it was urged for the respondents that the appeal should be struck out as the notice was not in the form given by the Act. The objection was held to be fatal and the learned judge of the Court of Mines refused to hear the appeal and thereupon the appellants obtained from this Court an order *nisi* for a mandamus. The case turns upon the true construction of sec. 212 of Act No. 291 which gives an appeal from a warden to the Court of Mines provided the person desirous of appealing deposits within ten days the sum of £10 and also within ten days serves on the other party "a notice in writing in the form in "the 29th Schedule to this Act stating the intention "to appeal, and the grounds of such appeal, and the "time and place at which such appeal shall be heard." The appellants in this case complied with all conditions except that they failed to fill up the blank in the schedule form left for the insertion of the name of the place at which the proceedings had been heard by the warden. In other words their notice stated all that the statute requires to be stated but did not give the further information implied by the schedule, viz., the name of the place at which the case had been heard. Counsel for the respondents before me did not argue in support of this objection except by relying upon a decision of Mr. Justice Molesworth's in which he dealt with this very objection and upheld it (*Frayne v. Carr* 5 W.W. & A'B. M. 12). It is clear from that case that no literal compliance with the form is requisite and the groundwork of that decision and of the decision of the same learned judge in *Kilgour v. Flynn* (5 W.W. & A'B. M. 32) may I think be gathered from a passage in his judgment in *Ryan v. Callaghan* (6 W.W. & A'B. M. at p. 57). His honor there said in reference to the forms under this Act "these forms are intended to give simple un-"mistakeable information to non-professional people, "and the form here used might mislead. As to the first "mentioned objection the section 212 directs the form "in schedule 29 to be used, but I have held some slight deviation from it allowable." Adopting this test as to the sufficiency of the notice of appeal, is the omission to fill in the word "Beechworth" such as to make the notice misleading to anyone. The appellant has given the substance of the notice required by the section in stating his intention to appeal, his grounds of appeal and the time and place at which such appeal would be heard; and he has done so in a form which gives in its heading the mining district and which names the warden who de-

cided the case, states the date of his decision, sets out what that decision was and recites the names of the parties thereto and he does all this in the absolute form prescribed. I cannot see how any person could be misled by the slight deviation caused by omitting to name the place where this specified warden gave the specified decision between the specified parties on the specified date. But I was strongly urged not to act upon my own opinion but to follow the decision in *Frayne v. Carr* and to leave the matter to be finally dealt with by the Full Court. I have been greatly impressed by this argument for I think it is of the utmost importance that previous decisions of the same Court should not be departed from readily otherwise the uncertainty necessarily attending upon all litigation would be increased enormously. In the present case, however, I think that I am adhering to the principle enunciated in the previous decision and I think that I am at liberty to follow my own opinion as to the inference to be drawn in applying that principle to the document before me. I was also urged not to decide the matter at all but to refer it to the Full Court but this course I will not adopt unless when I am unable to come to a conclusion or by consent of both parties. If I decide the case the unsuccessful party may incur further expense in appealing if he pleases. That rests with him. But when a case is inferred by the judge the litigants are compelled whether they wish or not, to proceed further so that I think I ought to take the responsibility of acting on my own opinion and I therefore make the rule absolute for a mandamus but under the circumstances without costs.

Solicitors, for appellants, *Mac Dermott*; for the respondents, *Hopkins*.

PROBATE JURISDICTION.

(Before Hood J.)

Re Thomas deceased.

May 12.

Practice Probate—testamentary instrument in the form of a deed—testator's intention—parol evidence An instrument, in the form of a deed, from which the intention of the maker, that it is to affect the destination of his property after his death, can be gathered will, if properly attested, be held to be testamentary; and the testator's intention that such an instrument should operate as a will may, be proved by parol evidence.

Motion that probate of the will of Thomas Thomas deceased be granted to Anne Anthony as executrix according to the tenor. The deceased died on the 18th April 1890, having executed a document dated 10th September 1888, which was signed by the deceased and attested by witnesses. This document, so far as is material was as follows; "I Thomas "Thomas . . . do hereby declare that I give to "my sister Anne Anthony . . . all my property ". . . and all debts due to me . . . In fact "sister Anne Anthony has been so kind and so good "to me at all times that I do hereby hand over to her "all that I have and all that is due to me from all "sources and I request her to pay all my debts and "to keep William Stanton and Thomas Thomas on as "salesmen in the shop for six months to reduce the "stock and sell the balance by tender from sheets "taken of balance of stock in hand in six months "from the date of this deed. Witness my hand this "tenth day of September, 1888." [Then followed the signature of the deceased and the signatures of two witnesses who were described as "witnesses "to the signature." There was no regular attestation clause, but it was proved by the affidavit of one of the witnesses that all the formalities required by the "*Wills Statute* 1864" had been complied with.] It appeared, that, at the time the deceased asked the witnesses to witness his signature to the above document, he used these words "I want you to witness my "signature to this paper; it is only a paper that if any "thing happens to me things will be all right, for I am "feeling very ill." It further appeared from the affidavit of one Kelso a Presbyterian minister at Stawell that frequent conversation during a period of 4 years had taken place between Kelso and the deceased and that in the course of these conversations the deceased frequently referred to the fact that he felt unwell and said that he had some property to leave and that he could not take it with him and that whatever he had would go to his sister Anne Anthony; that in the course of a conversations between Kelso and the deceased which had taken place about 6 months before the death of the deceased Kelso had asked if the deceased had made any disposition of his affairs and property to which the deceased replied "Yes that is all settled"; on the same occasion the deceased complained of feeling very ill. On this state of facts the above motion was made to the court.

Higgins, in support. An instrument, whatever may be its form, from which the intention of the maker can be gathered, that it is to affect the destination of his property after his death, will, if properly attested, be held to be testamentary; *Hayes and Jarman on Wills* (8th Ed) 10; a duly attested instrument in the form of a deed has been held to be a will; *Re Morgan* (L.R. 1 Prob 214); *Doe v. Cross* (8 Q.B. 714); and the testator's intention that such an instrument should operate as a will may be proved by parol evidence; *Robertson v. Smith* (2 Prob 43); *Re Coles* (ib. 362); *Re English* (3 Sw. and Tr. 586). There is a request that the beneficiary should pay debts; that is sufficient to constitute her executrix and as there is no mention of executors in the will it is submitted that she should obtain a grant as executrix according.

His Honor appointed the applicant executrix according to the tenor.

Proctors, *Casey* and *O'Halloran.*

SUPREME COURT SITTINGS.

(Before Hood, J.)

Re Rollason, Infants.

——— May 1st and 8th.

Infant—maintenance—breaking in on corpus—Form of order. Where two infants were entitled to £75 each, the Court ordered that so much of the corpus of the share of each infant should be broken into as together with the income of his share, would make a sum of £9 a year in the one case and £7 a year in the other.

Motion for an order that the executor of the will of Alfred Horton Rollason, deceased, should be at liberty to expend out of the estate of the infants a sum of money for the maintenance and education of the infant children of the deceased. (The facts appear in the judgment).

Woolf appeared in support.

His Honor.—This was an application by Joseph Inman executor of the will of Alfred Horton Rollason deceased, for leave to expend out of the estate a sum of money for the maintenance and education of the infant children of the said deceased. Rollason died 27th June, 1887, leaving a small estate, and by his will he gave to his children Alfred Ernest Rollason and Charles Rollason £75 each to be invested for them until they were twenty-one years of age. The executor only paid into the Melbourne Savings Bank the amount due to the children who are now respectively of the ages of six and four years, and he applies for permission to use that money or some portion of it for the benefit of the children. Since the death of the testator the executor has maintained these children at his own expense (the widow who is a boot machinist only earning about 16s. per week, being unable to do more than support herself) and he is willing to continue maintaining them till each attains the age of fifteen years if he receives some allowance, however small, but he states in his affidavit that he is unable to do so without some assistance. When the application was made I refused it so far as regards paying over the whole sum at once. Such a course would deprive the Court of all control over the money and in case of the death or insolvency of the applicant might defeat the very object desired, viz, the proper use of their money, so far as it will go, for the benefit of these infants. As to authorising the Secretary to spend the money in instalments I have hesitated. To do so is directly to disregard the testator's intentions and it is the duty of this Court to apply the property of deceased persons according to their wills and not to substitute its discretion for theirs *Re Giles* (4 V.L.R. E. 37). On the other hand I have to consider the interests of the children. They are practically destitute and if I refuse to grant this application they will probably be brought up as paupers and the money when paid to them on their majority would be more likely to do them harm than good. I will therefore make an order founded on those made by Mr. Justice Molesworth in *Re White* (12 V.L.R. 219), and by Mr. Justice Webb in *Re Dwyer* (12 V.L.R. 431) as follows:—Let Joseph Inman executor of the last will of Alfred Horton Rollason deceased be at liberty to deduct from the capital of the share of Alfred Ernest Rollason an infant child of the said Alfred Horton Rollason such sum as will with the income of such share from time to time make up the sum of £9 a year, and from the capital of the share of Charles Rollason, an infant child of the said Alfred Horton Rollason such sum as will with the income of such share from time to time make up £7 a year for the maintenance and clothing of such infants so long as the said Joseph Inman shall continue to maintain and clothe such infants until they respectively attain the age of fifteen years, or further order, and let the said Joseph Inman be at liberty to deduct from each of the said capitals respectively one-half part of the costs of this motion when taxed as between solicitor and client. Refer to tax. Liberty to apply.

Solicitor, *Donahoo.*

(Before Hood, J.)

Re Looby.

——— May 29.

Order nisi—Voluntary Sequestration—Application to discharge order—Costs—Insolvency Statute 1871, *s.s.* 14, 40.

An application to discharge an order nisi obtained for the sequestration of the estate of a debtor was made by the petitioning creditor; it appeared that, on the same day as that on which the order nisi had been made at M. the debtor had voluntarily sequestered his estate at B. without being aware of the making of the order nisi; the court discharged the order with costs to the petitioning creditor to be paid out of the insolvent estate.

Motion to discharge an order nisi obtained for the sequestration of the estate of J. Looby. The application was made on behalf of the petitioning creditor. The order *nisi* had been granted in the Supreme Court on the 15th May and on the same day, but later, the insolvent had voluntarily sequestered his estate at Benalla on discovering a few days later

that an order *nisi* had been made, he entered into negotiations with the petitioning creditor of which the result was the present application. The above facts were embodied in an affidavit made by E. A. Smart solicitor for the petitioning creditor. Costs were also applied for as against the insolvent estate.

Cook, in support: The Court has power to grant costs on an application of this kind; s.s. 14, 40. "*Insolvency Statute*, 1871;" *Re Marie* (3 A.J.R. 6); *Re Bunnett*, (3 Ch. D. 320).

His Honor considered that section 14 enabled him to make the order with costs to the petitioning creditor out of the insolvent's estate.

Solicitors: *Smart and Walker.*

SITTINGS IN BANCO.

(Before Higinbotham C.J, Holroyd and Hood, J.J.)

WALKER v. WINGFIELD.

20 March.

Appeal from County Court—The administration of Justice Act 1885 *(No.* 844*) section* 8*—An appeal will not lie under this section unless the judge has taken a note of the question of law raised, the facts in evidence in relation thereto and his decision thereon.*

This was an appeal by order *nisi* under the eighth section of *The Administration of Justice Act* (1885) from the decision of the County Court Judge at Inglewood. The action which was for L175 7s. 4d. was tried before a jury of four who returned a verdict for the plaintiff for L11 0s. 8d. The order *nisi* was obtained on the ground "that there was no evidence of any cause of action which could be legally submitted to a jury for their determination." The beginning of the judges notes was as follows: "*Mr. Barrett* for plaintiff; *Dr Quick* for defendant. Defence—Payment on delivery—Agent for plaintiff—No right to get case down for trial by jury. *Dr. Quick* takes preliminary objection: *Mason v. Ryan* 6 A.L.T. 152; here only L11 is really in dispute the defendant has paid L168 according to his (*i.e.* the plaintiffs) opening statement and therefore no jurisdiction for a jury." And then followed the evidence in the course of which it appeared that L168 had been paid and that L11 only was in dispute. There was no further note on the preliminary objection.

Fink to move absolute.

Barrett to show cause. The point on which the appeal was taken was on the preliminary objection that the admission of the plaintiff's counsel showed the action to be a sham and that the judge should have taken the case from the jury. The judge although he has taken a note of the objection has taken no note of any decision. The absence of any record of a decision is fatal to an appeal under this Act.

Fink in reply. This claim was a fictitious one to get a trial before a jury. The admission of the plaintiffs counsel showed the claim was fraudulent and the judge should have taken it from the jury. He cited *Seymour v. Coulson* 5 Q.B.D. 359; *Fox v. Johnston*, 1., V.L.R. (L.) 284; *Kavanagh v. Sachs* 3 V.L.R. (L.) 259.

Per Curiam.—We think the defendant has not brought this appeal within the terms of the eighth section of the *Administration of Justice Act*, 1885, which lays down the conditions and limits to appeal under that section. The ground of objection taken to the decision of the learned judge was founded on an objection by the defendant's counsel after the plaintiff's counsel had opened his case. The plaintiff's counsel stated in his opening that the sum of L175 appeared as the amount of the claim but that a sum of L11 only was in dispute. On that statement the defendant's counsel raised as a preliminary objection to having the case tried by jury and to the jurisdiction of the court on the ground that the statement of the plaintiff's counsel was an admission that the plaintiff's claim was fictitious and fraudulent and made up for the purpose of obtaining a trial by jury. The learned judge has taken a note of the objection and no decision is recorded by the judge and the case proceeds and a verdict is given for the plaintiff. Several observations arise on this objection. I am disposed to think, and my learned brothers too, that this is an objection the judge might refuse to entertain, and leave it to the defendant either by separate motion or summons or by prohibition or as advised to remove the decision on the issues from the jury. He may have taken that view or he may have thought he could not infer *bona fides* or otherwise from the statement of the plaintiff's counsel. Whatever view the learned judge took he has not recorded his decision and the absence of any record of the decision makes it impossible to deal with the appeal under the provisions contained in the eighth section which enacts that . . . "the judge at the request of either party shall make a note of any question of law raised at such trial or hearing and of the facts in evidence in relation thereto and of *his decision* thereon . . ." We cannot deal with any question of law under this section unless the judge is asked to take, or takes a note and decides the question of law raised and records his decision. We cannot entertain this matter and cannot look to the subsequent evidence and spell out a view of the decision we are asked to conjecture from facts subsequently proved. We think this rule must therefore be discharged with costs.

Order discharged with costs.

Solicitor for plaintiffs, *Ford* for *H. S. Barrett*; solicitor for defendant, *Miles* for *Lamont.*

(Before Higinbotham, C.J., Williams, and Webb, J.J.)

REGINA v. MASON.

22nd May.

Criminal Law and Practice Statute (1864) *Section 64—Larceny as a bailee—A person who received a specific sum of money for a specified purpose and who did not apply it to that purpose but converted it to his own use, held properly convicted of larceny as a bailee.*

Question of law reserved by the Chief Justice for the Full Court, namely, whether on the evidence the charge of larceny as a bailee could under Section 64 of the Criminal Law and Practice Statute (1864) be supported against the prisoner.

The facts and cases cited appear fully in the judgment of the Chief Justice.

J. T. T. Smith for the Crown.

The prisoner was not represented.

HIGINBOTHAM, C.J.—In this case the accused Frederick Mason was charged under the 64th Section of the *Criminal Law and Practice Statute* (1864) with larceny as a bailee, and it appeared that he had received from the prosecutrix a specific sum of money (it did not appear in what form it was given) for a specified purpose, namely, to be applied by him in payment of a bill of costs owing by the prosecutrix to her solicitor. The prosecutrix drew money from the savings bank in presence of the prisoner and gave him portion sufficient to satisfy the bill of costs, and gave it to him to pay to her solicitor and he spent part of that money. We think under these circumstances he was properly found guilty of the offence charged under this section which says "Whosoever being a bailee of any property shall fraudulently take or convert the same to his own use or the use of any other person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, shall be guilty of larceny." "Property" is defined by a later Act (section 7 of the *Criminal Law and Practice Amendment Statute*, 1871) to include "every description of real and personal property, money, debts and legacies and all deeds and instruments relating to or evidencing the title or right to any property or giving a right to recover or receive any money or goods." Therefore it includes a sum of money and appears to apply to all cases where money or something representing money is delivered to a person on an express or implied engagement by that person or trust imposed on that person either to return it to the bailor or dispose of it in accordance with the mandate or direction of the bailor. There has been some uncertainty as to the application of this section as appears from some cases cited, but we think all of them present clear grounds of distinction from the circumstances of this case. In the case of *Reg. v. Hennelly*, 14 V.L.R. 59 the money which the prisoner was charged with taking was money mixed up with other money: it was not the case of a specific sum appropriated for a specific purpose. So in *Reg. v. Hoare* 1 F. and F. 647 and in *Reg. v. Garrett*, 2 F. and F. 14, the money was not a specified sum to which a duty was attached by the terms of the bailment. The same question was considered by the Court of Crown Cases Reserved in *Reg. v. Hassall*, L. and C. 58, and the same distinction is pointed out by the Court in the judgment. In that case the money was the money of a club not enrolled as a friendly society, and the prisoner who was the treasurer was unable to make certain payments required by the rules of the club, but the money he was charged with stealing was not a specific separate sum in respect of which he had a special charge or a special duty. The Chief Justice says "The word bailment must there" (referring to 20 & 21 Vict. c. 54, sec. 4) "be understood in its legal acceptation, viz., a deposit "of something to be returned in specie, and does not "apply to the receipt of money with an obligation to "return the amount when there is no obligation to "return the identical coin." These cases are not inconsistent with our judgment in this case and our judgment is consistent with the case of *Reg. v. Wells*, 1 F. & F., 109, in which *Erle, J.*, treated the case as an indictment for larceny as a bailee under the corresponding section of the English Act. It appeared in evidence that the prisoner had received a specific sum of money for a specified purpose, and *Erle, J.*, told the jury that if the prisoner had appropriated the money to his own use and he did it so *fraudulently*, then he would be guilty of larceny, under the Act to make better provision for the punishment of frauds committed by trustees, bankers, and other persons entrusted with property, even although at the time he so appropriated it he might have hoped or expected that he would be able to repay it. So a case in this Court, *Reg. v. Ah Poo*, 7 V.L.R (L) 8, assuming it was decided on the first count of the indictment, would be a clear decision in accordance with the proposition which we now hold, namely, that if a specific sum is given for a specified purpose the bailee is liable under an indictment for larceny as a bailee if he does not apply the specific sum in accordance with his mandate. In *Reg. v. Loose*, Bell C.C., 259, it was assumed that the prisoner would be liable for larceny as a bailee, but for the fact that the property was laid wrongly in the indictment, and on that ground alone it was held the conviction could not be supported. From the authorities referred to we may state broadly that we are of opinion that where a specific sum of money, or instrument representing money, coin, bank notes, cheques, or anything constituting property, or representing money, is delivered to a person with an express or implied mandate either to return it or apply it in some other way directed by the bailor and it is accepted by the bailee on those terms and he applies the money or property fraudulently to his own use, and not in the way directed he is guilty of an offence under the Act. We think the conviction in this case was right

WILLIAMS, J.—It is important to notice the facts in

this case. It is not a case merely of a bailee not returning money to a bailor: this is a case where the bailee gets a specific sum of money to pay to a specified person for a specified purpose; the bailor designated the purpose to the bailee, gave him a specific sum and told him to pay it to a specified person: the prisoner did not do so, but converted it to his own use. There is an old case in 2 East, Pleas of the Crown, page 566, *Lavender's Case*, which seems to support our judgment.

His Honor read the note of the case.)

WEBB, J.—I concur with the judgment of the Court on the authority of *Reg v. Wells*.

Solicitor for Crown, *Crown Solicitor*.

Before Higinbotham, C.J., Holroyd and Hood, J.J.)

THE LOCAL BOARD OF HEALTH OF HAWTHORN v. FISHER.

27th March.

The Public Health Amendment Statute, 1883 (No. 782) *Section* 131—*Insufficiency of notice to owners under this section.*

This was an order *nisi* to review an order of the Hawthorn Court of Petty Sessions by which John Fisher was directed to pay L26 14s. his portion of the expenses incurred by the Local Board of Health, in forming, paving, levelling and draining a certain passage formed and set out on private property situate off Redfern Road. The notice to form &c. the street and served on John Fisher was in the following form: "To Mr. J. W. Fisher, of Redfern Road, Hawthorn, owner of the premises fronting, adjoining, or abutting upon the undermentioned passage, who by himself or his tenants has the right to use and does commonly use such passage The Local Board of Health of the Town of Hawthorn Do hereby give you notice that the passage situate in Section off Redfern Road, Easterly, within the said Town and formed and set out on private property in such a manner as to afford means of back access to your premises adjacent thereto, is not formed &c. to the satisfaction of the said Board of Health and the said Board of Health do hereby give you notice and hereby require you within fourteen days from the service hereof to form &c the said passage in the manner and according to levels and specifications approved by the said Local Board of Health, and detailed, shown, and set forth in the plan and documents hereunto annexed . . . " It appeared from the evidence that there were other owners of land abutting on the passage but no evidence was given to show that they had been served with the notice. It was urged for the defendant that the notice was bad inasmuch as it called on the defendant to form the whole passage whereas the evidence showed that other persons were also adjoining owners. The magistrates decided in favor of the complainants and the defendant obtained an order *nisi* to review their decision.

Mitchell to move absolute.

Bryant to show cause.

It was suggested during the arguments that the proper notice should have been either a notice served on each owner calling on him to do his proportionate part of the work or a notice addressed to all the owners to do the whole work a copy of such notice to be served on each owner.

HIGINBOTHAM, C.J.:—We think the notice in this case is bad. It calls upon one of the owners of land abutting on a road to do the whole of the work required to be done. It is unnecessary for us to express our opinion as to what is the right form of notice. We are clearly of opinion that the form of notice given here is wrong. The order to review will be made absolute with costs and the order of the Court below reversed.

Order absolute with costs.

Solicitors for complainants, *Eggleston, Derham and Martin*; solicitors for defendants, *Wilmoth and Wild*.

(Before Higinbotham C.J., Williams and Webb J.J.)

PICKEN v. SHIRE OF MOUNT ALEXANDER.

4th May.

Rules of Supreme Court—Order 64 *rule* 7—*Order* 39 *rule* 4—*Application for extension of time to serve notice of motion for a new trial after the time had expired — insufficiency of affidavit.*

Walker v. McKinley 11 V.L.R. 366 explained.

Appeal from an order in Chambers of Kerferd J. dismissing a summons for leave to serve notice of motion for a new trial after the time had expired.

The action was tried at Sandhurst before Mr. Justice Kerferd and a jury on the 22nd of October 1889, and the jury having found a verdict for the plaintiff, His Honor decided to let the question as to how judgment should be entered stand over for a motion for judgment. On the 14th November on the plaintiff's motion for judgment His Honor directed judgment to be entered for the plaintiff for the amount of the verdict and costs. On the 12th of December the defendants took out a summons for leave to move for a new trial and Mr. Justice Kerferd dismissed this summons with costs. The defendants' solicitor made an affidavit in support of the summons, the portion dealing with the delay in taking out the summons was as follows: "immediately on hearing of the result and effect of His Honor's decision" (the decision on the motion for judgment) "I took steps to make this application and that the subsequent delay was caused by communicating with my clients and a

difficulty in procuring a copy of the learned judge's notes."

Kilpatrick, with him *MacDermott* for the appellants. An appeal lies from a judge's discretion when there has been a miscarriage of justice or when the judge has acted on a wrong legal principle and therefore has not exercised his discretion at all. Annual Practice (1889-90) page 827. *Gardner v. Jay*, 29 Ch. D. p. 58. In this case the learned judge based his judgment on *Walker v. McKinley*, 11 V.L.R. 366. It is clear from the report of that case that the judgment is based on a misconception: It is treated all through as an application to extend the time for appeal and all the cases cited in the judgment refer only to appeals. A new trial motion differs from an appeal. The decision or an appeal is or may be final, in a new trial motion it is not. Notice of appeal is given under order 58 rule 15 and of a new trial motion under order 39 rule 4, the negative words in the former rule make the notice mandatory: in the latter rule the words are affirmative and merely directory. In *Smith v. Smacksmen Co.*, 32 W.R. 184, and *Peckett v. Short Brothers*, 32 W.R. 123, cases decided in 1883, applications to extend the time to move for a new trial after the time had expired were granted, and *Collins v. The Vestry of Paddington* 5 Q.B.D., 361, decided in 1880, which is basis of the judgment in *Walker v. McKinley* is not referred to.

Duffy (with him *Shiels*) for the respondent. When a party has got judgment he has a vested interest in it, and leave after the time has expired to apply to set aside that judgment will not be granted except under special circumstances. *Collins v. Vestry of Paddington*. *Walker v. McKinley* is good law and is followed in *Youngman v. Melbourne Storage Co.*, 7 A.L.T. 53. The verdict of the jury is final, and a motion for a new trial is the same as an appeal. There is nothing to show on what ground the judge gave his decision; the affidavit was insufficient. (He was stopped by the Court),

Kilpatrick in reply.—The affidavit is sufficient as sworn by an officer of the Court. The defendant's solicitor's retainer ended with the judgment in the action and he could take no further steps without the authority of his clients.

HIGINBOTHAM, C.J.: This is an appeal from an order of the late Mr. Justice Kerferd dismissing a summons by which the defendants applied for an extension of time to enable them to give notice of motion for a new trial in this action. The case was heard on the 22nd October, 1889, and by consent of the counsel for the parties the entry of judgment was reserved till a motion for judgment was made in Melbourne. It was made and judgment was entered for the plaintiff on the 14th November. It was not till the 12th December that the defendants took out the summons asking for the extension of time to enable them to apply for a new trial. Treating the case as if it came before this Court in the first instance, we are of opinion that the delay from the 14th November till the 12th December has not been explained, and that that would have been a sufficient reason why the learned judge should have dismissed this summons, and it is a sufficient reason why this Court should now dismiss the appeal against his decision. An application for an extension of time is one of very great importance to the party who makes it, and to the party against whom it is made. But it is a collateral proceeding, and is an application which does not require and which ought not to be allowed a long lapse of time in order to prepare and bring it forward. It is not like an application for a new trial, in which case all the materials and evidence must be brought before the Court to enable it to decide whether a new trial should be granted or not. The materials necessary for an application for extension of time need not be so full; they should be compressed into a much smaller space than is necessary on an application for a new trial, and it should be made in a shorter space of time. The affidavit of the defendants' solicitor, in which he sets out the cause of the delay in this case is not sufficient. He states that on hearing the result of the motion for judgment on the 14th November, he took steps to make this application to extend the time for giving notice of motion for a new trial. He does not state when he received the information, nor does he state what steps he took when he heard it. He also says that the subsequent delay was caused by communicating with his clients and a difficulty in procuring a copy of the learned judge's notes. I do not think it would require the express assent of the client to such a motion. But apart from this, the Court should have been informed what were the causes of delay in these communications to enable them to decide whether those causes were reasonable. An application of this kind must be very promptly made. It is obviously an application which tends to delay the remedy of the successful party. And when it was delayed from the 14th November till the 12th December the decision on it could only be given shortly before the long vacation, and special despatch should have been used in making it. The absence of any explanation of that delay may have been the reason for refusing to extend the time to give the notice of motion. We do not say anything about the very ingenious and able argument of Mr. Kilpatrick for the defendants about the alleged difference and distinction between an application to extend the time to appeal from a judgment and to extend the time for leave to apply for a new trial. We do not know what were the grounds of the learned judge's decision, and unhappily it is now too late to ask and ascertain them. It is possible that his decision may have been founded on the mistake alleged to have been made by him in not drawing a proper distinction between the two classes of cases, or it may have been given on other grounds which would have justfiied it. It may have been based on the ground of the delay by the defendants; or it may have been that the learned judge held that the points which the defendants' solicitor *bonâ fide* believed had been reserved were not reserved, and therefore that the extension of time should not be granted. We cannot now ascertain the precise ground on which the learned judge has given his decision; but the ground on which the appeal from his decision is dismissed is that there ap-

pears on the face of the case to have been unreasonable delay on the part of the defendants in applying for an extension of time. That would have been a sufficient ground for the learned judge dismissing the summons, and it is a sufficient ground for dismissing the appeal.

WILLIAMS, J.—I do not express any opinion as to whether a solicitor, after final judgment has been obtained, can take other steps in the case without receiving the authority of his client. I rather think the solicitor can not, for I think once final judgment is obtained the solicitor's authority ceases and he must have express authority for another step. I was very much pressed with the distinction which Mr. Kilpatrick has drawn between the wording of the rules relating to applications for new trials and motions relating to appeals from judgments—the one containing affimative words, and the other negative words—and the cases he has cited, and also his argument as to the effect of the application, that in the one case it concluded the action and in the other it did not. It is not necessary to give a decision as to whether that view is well founded or not. As regards the case of *Walker v. McKinley*, 11, V.L.R., 366, which has been cited for the defendant, and in which I refused a motion for leave to extend the time to apply for a new trial, I have been up to this day always under the firm conviction that it was a case of an appeal from a judgment, that the motion was to extend the time for appealing from a judgment. It will be seen from the first paragraph of my then judgment, which was a written one that I thought it was such a motion. I had got it into my head that it was a motion to extend the time for an appeal from a judgment and I have only got it out of my head this morning. I make these observations so that that case may be thus far corrected as I still believe it is thoroughly good law for the purpose for which I gave the judgment but whether it is good law in reference to an applicationfor the extension of time to serve notice of motion for a new trial is an entirely different matter. I am not sure on the point, but I rather think it is not.

WEBB, J.—Mr Justice Kerferd might have dismissed the summons to extend the time on the ground of delay, and if so this appeal should be dismissed. If he gave it on other grounds, and they were wrong, then this becomes a substantive application to the Court to extend the time and it should be refused on the ground of the delay, so that either way the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for plaintiff *Duffy and Wilkinson*; for defendant, *Merrifield.*

(Before Higinbotham, C.J., Williams and Webb, J.J.)

PARKER AND OTHERS v. SELL.

1st May.

Landlord and tenant—a party contracting with himself—Where a defendant has an interest with the plaintiffs in the subject matter of the contract if their interests can be distinguished the contract will be enforced and the general rule does not apply that a party cannot contract with himself—Covenant to keep and maintain in a fair and reasonable condition.

Appeal from the judgment of a'Beckett, J.

The plaintiffs and the defendant were equitable joint owners of certain lands including an orchard at Doncaster. Paragraph 6 of the Statement of Claim stated that "by agreement dated the 29th day of May, 1888, made between Tom Petty and John Howard Aylwin as agents for the owners of the said land of the one part and the defendant of the other part the former agreed to let and the latter to rent the said land upon certain terms and conditions contained therein." By one of the conditions the defendant agreed to keep and maintain the orchard (part of the lands) during his tenancy in fair and reasonable condition. The plaintiffs claimed amongst other things L300 damages for breach of this condition. Paragraph 9 of the defence stated "the defendant will object that the agreement of May 29th, 1888, was null and void, inasmuch as the defendant thereby purported to contract with himself." The learned judge gave judgment for the plaintiffs and assessed the damages at L100. The principal point argued on appeal was the objection in law raised by the 9th paragraph of the defence. The evidence shewed that the fence round the orchard was broken down in places at the time the tenancy commenced and that during the tenancy cattle came in and injured the orchard and it was argued that the learned judge assessed damages on the basis that the words keep and maintain in fair and reasonable condition amounted to a covenant to fence.

Isaacs with him *Hayes*, for defendant appellant.—A man cannot contract with himself: *Leake on Contracts* 439, *Fawkner v. Lowe* 2 Ex. 595, *Mainwarring v. Newman* 2 B. & P. 120, *De Tastet v. Shaw* 1 B. and Ald. 668, *Bosanquet v. Wray* 6 Taunt 596, *Grey v. Ellison* 25 L.J. Ch. 666, *Lindley on Partnership* 267, *Farrar v. Farrar* 40 Ch. D. 395, per *Chitty* J. 404 and per *Lindley* L.J. 409. The damages are assessed on the basis that the words keep and maintain in fair and reasonable condition amounted to a covenant to fence the orchard, this is wrong: the defendant is not bound to put the fence in better condition than it was when he entered.

Madden with him *Irvine*, for plaintiffs respondents. The general rule does not apply when the interests can be distinguished. Joint tenants can make a valid demise of their portions to one of themselves *Cowper v. Fletcher* 34 L.J. Q.B. 187. A covenant to keep in repair involves a covenant to put in repair *Paine v. Haine* 16 M. and W. 541. The words of the learned judge taken with the rest of the judgment only show the learned judge thought the defendant would be compelled to fence so as to prevent injury from cattle.

Isaacs in reply, *Walker v. Hutton* 10 M. and W. 258.

HIGINBOTHAM, C.J.—The first ground on which this appeal is presented and the one mainly relied on is the ground stated in the 9th paragraph of the defence in which the defendant states (His Honor read the paragraph). The defendant in support of that objection relies on a rule of law that the same person cannot be a party on both sides of a contract and that an agreement to that effect creates no legal right or liability. This rule has been more frequently applied in courts of law than in courts of equity but in both courts it is recognized as a rule, which in the particular case to which it applies, is one of common sense and must be reasonably applied. In the case cited where a person agreed to pay a debt to himself and another the rule was applied and rightly, we think, it was held that an agreement to pay oneself is senseless and of no effect. In *Gray v. Ellison* a case in equity where the alleged contract was on a policy of insurance it appeared the party was contracting with himself as well as others in respect of an interest in which he was concerned and it was held the contract could not be supported. In most cases the question has arisen on a question of parties either in the pleadings or as disclosed by evidence. In this case the plaintiffs do not include the defendant, but it is said when the contract is looked at it purports to be a contract between the defendant on the one side, and the defendant and others on the other side. But that is hardly correct; it purports to be a contract between John Petty and John Howard Aylwin, as agents for the owners on the one part, and W. Sell on the other part. The evidence shows that the equitable owners include the defendant, and it is contended that agents acting for the owners, amongst whom was the defendant, contracted with the defendant. Several cases have been cited to which the general rule laid down is inapplicable; cases where the interests of the parties can be distinguished, and it is possible to put a construction on an agreement and apply it so that the defendant shall not be deemed to be a party on both sides, and shall not be deemed to have contracted with himself. There have been cases in courts of equity where one partner has brought an action for damages against a co-partner, and it was held that the objection was untenable. Amongst the cases cited the case of *Cowper v. Fletcher*, 34 L.J.Q.B. 187, well illustrates the circumstances under which the objection will not apply. In that case three executors demised property to one of themselves, and the tenant did not pay the rent and his co-executors put in a distress. It was contended no such contract could exist as would entitle two of them to put in a distress against their then co-executor. Authorities were cited in that case which bear very strongly on the present one. Here is a quotation from 1 *Bac. Abr.* 5 "If one joint tenant or tenant in common makes a lease for years of his part to his companion, this is good, for this only gives him a right to take the whole profits, where before he had but a right to take the moiety thereof; and he may contract with his companion for that purpose as well as he may with any stranger," and Blackburn J. in his judgment says, "it is now set up that this cannot operate as a lease and that there was no rent in arrear under such lease for which a distress might be legally made, but I think it is clear that the parties were agreeing for a lease, and that we ought to give effect to it in this way, that the two defendants who were seized of two-thirds of the land agreed to let to the plaintiff those two-thirds, and allowed him to have exclusive possession of that third which was in him. We think that construction of that agreement is applicable to this case, and that the owners in this case who are said to be joint tenants at the time of the demise in 1888 may be held to have let their individual shares in the land to the defendant, and that there was a valid contract between them on the one side, and the defendant on the other, and if that view be taken this demise is a good demise in accordance with the terms on which it was executed, and the defendant is liable to be sued on his contract to keep the demised premises in fair and reasonable condition. The second objection is taken to a mis-direction the learned judge must have given to himself when he assessed the damages. In considering the evidence relating to the condition of the orchard, he uses these words "I think the words keep and maintain the orchard during the tenancy in fair and reasonable condition amount to a covenant under which the defendant would have to fence." If these words be regarded as expressing the ground on which tne learned judge proceeded to assess the damages, the proposition he stated is not law. The defendant in this case is bound to keep and maintain the orchard during his tenancy in fair and reasonable condition—he is not bound to deliver it up in good condition—only to keep and maintain it in fair and reasonable condition. These words must have reference to the condition in which it was at the time of the demise, and we think that these words would not impose the obligation to erect a fence where no fence had been round the orchard, or to fill up gaps where there had been gaps before, as the tenant could fulfil his contract by other means, and keep the orchard in such fair and reasonable condition as would satisfy his obligation. On examining carefully the language of the judgment, we do not think it appears clear the learned judge intended to lay down that proposition; he appears to have considered it to have been necessary to keep the orchard in good condition, and the best means would have been to fence it. From the words of the judgment it does not appear to us that the learned judge presented to himself any legal view of the contract, but he seems to have endeavoured to have discovered the amount of damage suffered by the defendant's omission to keep and maintain the orchard in a fair and reasonable condition, and he has assessed these damages at L100. This was a question of fact, on which the learned judge from the evidence was most competent to form an opinion, and we will not disturb such a finding. Both objections having failed the appeal will be dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellant, *Taylor and Russell*, Solicitors for respondents, *Abbott, Eales and Beckett.*

Before Higinbotham, C.J., Williams and Webb, J.J.

6th May.

BROWN AND OTHERS v ANTHONESS.

Action for the recovery of land — Survey Boundaries Act 1885 (*No.* 855) *Sections* 3, 4 *and* 6 — *Difference between "discrepancy" and "patent error or mistake" in section 4.*

Appeal from the judgment of A'Beckett J.

The action was brought to recover possession of certain land, about an acre in extent situate at Boroondara. The plaintiffs contended that they were entitled to the land under the description contained in the crown grant issued in 1853, to the original purchaser. The defendant contended he was entitled under the provisions of the *Survey Boundaries Act* 1885, to the land in dispute, as there was a discrepancy between the land in dispute, as described in the grant, and the land as marked by the surveys. The learned primary judge held that there was a "discrepancy" between the land described in the grant and the land as marked by the surveys; but that it was a case of "patent error or mistake" within the meaning of section 4 to which the Act did not apply, and he accordingly gave judgment for the plaintiffs.

The other facts and arguments which turned on the meaning of the word "discrepancy" in the Act appear sufficiently in the judgment.

Dr. Madden for defendant appellant.

Mitchell and Weigall for plaintiffs' respondents.

HIGINBOTHAM, C.J.—This is an appeal from a Judgment of Mr. Justice A'Beckett in an action of ejectment. The judgment was for the plaintiff. The question to be determined in the action is what is the northern boundary of portion 116, or, conversely, what is the southern boundary of portion 117, Boroondara. Both of these portions of land were sold by the Crown, so far back as 1853—one portion (117) to Sir John O'Shanassy, and the other (116) to Mr. Gill. The plaintiff has succeeded by purchase to the possession of the land contained in portion 116. In support of his claim to the land in dispute he put in the grants to portions 117 and 116. The grant of portion 117 shows that portion 117 extends from the Canterbury road southwards to a point marked by a red line nearly opposite to the west side of the Middle Burwood road, and south by 52½ links to a black line, which indicates the line of fence erected at a very early period after the sale, and since recognised more or less fully by the owners on both sides as the line of division between 116 and 117. The plaintiff now claims possession of the land corresponding in width to the portion between the black line and the red line on the south of his land, setting up the grant as determining the northern boundary of portion 116 and the southern boundary of 117. The defendant presents his case as one which is supported by the Act of 1885, No. 855, and entitled "*An Act to adjust discrepancies between Surveys and Titles and for other matters.* A large portion of the argument before the primary judge and the judgment of the primary judge appears to have proceeded upon the construction of some of the provisions of the act, especially sections 3, 4, and 6. In dealing with the act the learned judge stated a view of it with which to a certain point we concur. He said—

"The evidence satisfied me that the original survey marks of the southern boundary of portion 117 have been removed, and that the owner of the portion has for more than 15 years regarded the fence abovementioned as agreeing in position with the southern boundary. So that if sections 3 and 4 of this act apply, I should regard the line of the fence as the line of the southern boundary for the purpose of this action, and the plaintiff would in that case fail. It is, however, contended on his behalf that the act has no operation to the present case, inasmuch as section 6 is merely supplementary to sections 3 and 4, providing what is to be taken as evidence of the position of the original survey marks, but these survey marks are made effectual legal boundaries only by sections 3 and 4, and it is provided by section 4 that nothing in sections 3 or 4 shall apply to any allotment where an actual patent mistake or error has been made. I agree with this construction the act."

Up to this point we concur with the learned judge. But we differ from him when he proceeds to state his opinion that discrepancy between boundaries shown by the Crown grant and those which are to be taken as the survey boundaries (in this case indicated by the fence) is sufficient to constitute a patent error or mistake within the meaning of sections 3 and 4 of the act. The learned judge said—

"The difference between mere discrepancy and actual mistake may be merely one of degree. Where the discrepancy is slight it may be considered discrepancy, but where it is material it may be considered a mistake. In the present case it affects about 60 links in a frontage of about 2,150, and about one acre out of 46 as against the purchaser of portion 117. The error is one which, I think, could only have resulted from gross carelessness, and would only have to be pointed out to be remedied. I have, with some doubt, come to the conclusion that it is not such an error as the act was intended to cure, and that an actual patent mistake or error has been made within the meaning of section 4."

If that conclusion is right, the provisions of section 3 and 4 of the act, followed by the provisions of section 6, do not apply in this case, and the case is taken outside the statute. The learned judge arrived at that conclusion with some doubt. We hold so strong an opinion on the question as to justify us in stating that we disagree from the learned judge in thinking that a discrepancy such as is pointed out in this case, and which is a very considerable discrepancy cannot be treated, and ought not to be treated, as a "patent error or mistake" in the meaning of sections 3 and 4. It appears to us that the use of the words "mistake or error," and the departure from the use of the word "discrepancy" in those sections, points to the conclusion that the framers of the act intended to indicate something different in the use of these words, and that a "discrepancy" within the meaning of the act, although great, does not constitute an error or mistake within the meaning of section 4. The words taken in their natural sense are not synonymous. A

discrepancy undoubtedly may indicate a mistake. A discrepancy in documents of title may be the result of mistake, but the words taken in their natural sense do not seem to mean the same thing. However, connected the discrepancy may be with the mistake, and however great the discrepancy may be, indeed so great as to point to the probability of the existence of a mistake, it is different from a mistake. That 'error or mistake" was not intended to mean the same thing as "discrepancy" however great in the act seems clear when sections 3 and 4 are considered. By section 3 it is provided that the survey boundaries shall be deemed to be the true boundaries of the land, whether such boundaries upon admeasurement are or are not found to be of the same dimensions, or to include the same area as the boundaries or description given in the Crown grant. That is to say, that the survey boundaries are to control those mentioned in the grant, although the area and the boundaries differ from one another. Section 4 provides that the Crown grant shall be deemed to convey the land within the survey boundaries, notwithstanding any discrepancy between the dimensions of such survey boundaries or the area they include and the dimensions or area expressed in such grant, or shown in any plan in connection with the alienation by the Crown of such parcel of land. Then come the words, "Provided that nothing in this and the next preceding section shall apply to any such section, allotment, or parcel of land where an actual patent mistake or error has been made." The contrast between the use of the word "discrepancy" in section 3 and the earlier part of the 4th, and "patent mistake or error" in the latter part of the 4th section point to this, that a discrepancy, however large, resulting in a difference of area, however great, was not intended to be referred to in this proviso, where words "actual mistake or error" are used. That there may be a patent mistake or error without any discrepancy is obvious. There may be cases, indeed there have been instances, where, by mistake, land has been sold which had been previously alienated, and where land has been sold which had been reserved from sale, or proclaimed as dedicated for certain public purposes. In either of these cases it is obvious that a mistake was made, and to such a mistake the provisions of sections 3 and 4 of the act do not apply. But the discrepancy in this case is not a mistake or error, consequently the case is not taken outside the provisions of the act. Section 6 provides that when the survey marks of the boundaries of any section, allotment or other parcel of land have been removed or obliterated, then, in any proceeding or application in which the boundaries of such parcel of land have to be determined, when it is proved that certain buildings, fences, walls, or other improvements of a permanent nature or a succession of such improvements—(1) have ever since the removal or obliteration of such survey marks indicated or agreed in position with the boundaries originally marked on the ground by the survey marks so removed or obliterated; or (2) have for the full period of 15 years without interruption been used and regarded by the owner or occupier, or successive owners or occupiers, of such parcel of land as marking or agreeing in position with the boundaries of the parcel of land comprised in the document of title, such proof shall be deemed and received as sufficient evidence of the true position of the original survey boundaries of such land. Once you get to the survey boundaries and the case is brought within the act the fence is to be regarded within the meaning of section 6 as the survey boundary of portion 116. That survey boundary under section 3 becomes the controlling dominant indicator of the title, and if it is inconsistent with or contrary to the area or the dimensions as indicated in the grant, the description in the grant must be regarded merely as *falsa demonstratio* and the survey boundary indicated by the fence must be regarded as the true and real boundary of portion 116. The plaintiff has therefore failed, and the defendant will derive the benefit of this statute. The defendant and not the plaintiff will be entitled to judgment. The appeal will be allowed with costs, and judgment entered for defendant.

Appeal allowed with costs, judgment for defendant, with costs.

Solicitors for plaintiff *Blake and Riggall;* for defendant *Malleson, England and Stewart.*

IN THE SUPREME COURT OT TASMANIA.

IN CHAMBERS.

(Before Sir Lambeth Dobson, C.J.)

May 28th, 1890,

PRINCESS v. HEAZLEWOOD.

The Vendor and Purchaser Act 1875, (39 *Vic. No.* 2)—*As to payment of interest on purchase money,* *The Solicitor General* for the vendor (Princess). *Martin* for the purchaser.

THE CHIEF JUSTICE:—On the 21st April, 1889, Charless Princess agreed to sell, and E. H. Heazlewood agreed to purchase two lots of land for £3,473. Princess undertook to give possession of the second lot on the 23rd May then next, and of the first lot on the 1st April, 1890, and the agreement provided that Heazlewood should be entitled to the rents of both pieces of land from the 1st April then instant. Delays took place, and differences arose, and a summons was taken out for the 23rd May instant, by the vendors to compel the purchasers to pay interest upon their purchase money from the date of the agreement, and also to complete the purchase forthwith. On the summons coming before me it appeared that the vendor had not given possession and was not in a position to

give immediate possession of one of the lots, and therefore he could not require the purchaser to complete forthwith. The parties desired my judgment as to whether the purchaser was or was not bound under the agreement to pay interest on his purchase money. The contract seems to have contemplated an immediate completion of the conveyance, for the rents from the previous quarter-day are to belong to the purchaser, and the possession of one lot was to be given to him in the following month. Whilst the contract gives the rents to the purchaser, it is silent as to any interest being paid by him, so that he is entitled to the rents which have become due, and has been receiving the profits from the purchase money which has remained in his hands. If the conveyance had been completed at once no question might have arisen as to interest, but now more than a year has expired. This is a state of circumstances not contemplated by the agreement, and is a suit for specific performance by the purchaser. The Court would probably require him to pay interest. In *Birch v. Joy*, 3 *H.L.C.* 565, although the agreement contained a provision that interest should not commence till the conveyance was completed, after long delay in completing, the purchaser being in possession, the House of Lords held, on the purchaser's bill for specific performance, that notwithstanding the agreement, his exemption from interest could not, after so long a lapse of time, be enforced. In the case before me there is no agreement that interest shall not be paid till completion, but the contract is merely silent as to interest. The general rule is that a purchaser cannot have both the rents and also the interest on the purchase money The purchaser may be excused from paying interest by setting apart the purchase money and giving notice to the vendor upon the time for completion having arrived and the completion being delayed by the action of the vendor, but even under such circumstances Sir Wm. Grant in *Powell v. Martyr*, 8 Vesey 148 says "it must be a strong case and clearly made out." Again in *Fludyer v. Cocker*, 12 Vesey 25, he says "so absurd an agreement as that the purchaser was to receive the rents and profits to which he had no legal title, and the vendor was not to have interest, as he had no legal title to the money, could never be implied." The general rule is that the purchaser is looked upon in Equity as the owner and entitled to the rents, and the vendors as entitled to the purchase money and interest upon it, from the time the title is made out. Where, however, the contract for sale expressly reserved the rents to the vendor until completion, and nothing was said in the contract about interest on part of the purchase money the House of Lords held that "it necessarily follows from the reservation of rents to the vendor, that the purchaser was not to be called upon to pay interest upon the purchase money." *Brook v. Champernowne*, 4, Cl. and Fin. 611. So in the present case the agreement, that the purchaser shall have the rents, necessarily implies that the vendor shall have interest on the purchase money. The fact that the rents are referred to at all, seems to be that they are to be the purchaser's from the quarter day anterior to the agreement, and not from the usual time, and so far only is the usual rule affected, that when the purchaser receives the rents, he must pay interest on the purchase money. I have found no case in which the purchaser received the rents, and also had the benefit of the usufruct of the purchase money. The vendor is entitled to interest from the date of the agreement.

END OF VOL. XI.

AN ANALYTICAL DIGEST

OF THE

CASES REPORTED IN THE AUSTRALIAN LAW TIMES REPORTS,

FOR THE YEAR 1889-90.

VOLUME XI.

Compiled by JAMES C. ANDERSON, LL.B., *Barrister-at-Law.*

VICTORIA.

Action—Stay of proceedings—Where an action was commenced in the Admiralty Court by A against B for damages arising out of a collision between two ships, and subsequently B commenced an action against A in the Supreme Court arising out of the same matter the action in the Supreme Court was stayed pending the decision of the action in the Admiralty Court, *Cruickshank v. Tasmanian S. N. Coy.*, 20.

Administration Act 1872 (No. 427) Sec. 28—Administration bond—Breach—Non-filing three months' account—Assignment. The word "may" occurring in the 28th Section of the Administration Act 1872" is not mandatory. The mere fact of the non-filing of the three months' account is not *per se*, sufficient to induce the Court to exercise the power conferred upon it by the section, *In re McMillan*, 69,

——— Section 32"— Costs — The Court will not allow, under the above section, the costs of a rule *nisi* improperly obtained, *In re Currie*, 72.

Administration action—Separate accounts—Payment out of court—Costs—Master in Equity. Pursuant to an order made in an administration action, various sums of money when paid into Court to the credit of an action were equally distributed over four separate accounts. On motion for payment out of Court of the sum standing to the credit of one of these accounts on behalf of the person absolutely entitled it was ordered that the costs occasioned by the application should be taken from the whole amount in court and should not be levied exclusively on the fund drawn out. As the action had been commenced before the Judicature Act and as the papers in connection with the action were in the custody of the Master in Equity, the reference was made to the Master in Equity and not to the Chief Clerk, *Sawyers v. Kyte*, 33.

Administration of Justice Act 1885 (No. 844) section 8—An appeal will not lie under this section unless the judge has taken a note of the question of law raised, the facts in evidence in relation thereto and his decision thereon, *Walker v. Wingfield*. 198.

Admissions in criminal proceedings.—See Criminal Law, *Rattray v. Roach*, 188.

Adverse possession — See Transfer of Land Statute 1886.—*Lake v. Jones* 72.

Appeal.—See Practice, *Warburton v. Alison*, 170.

Appeal from County Court.—See Administration of Justice Act 1885, *Walker v. Wingfield*, 198.

Appeal to Privy Council—Order in Council (9th June 1860)—Points reserved—Where points are reserved for the decision of the Full Court and the Full Court has given its decision on such points the party aggrieved can appeal from such decision without waiting until the order embodying the decision has been passed. *Stevenson v. James* 109.

Balance Sheet—See Company. *Phillips v. Melbourne and Castlemaine Soap and Candle Coy.* 148.

Bankers' Books Evidence Act 1878 (No 620) Sec. 8. On an application under sec 8 of Act No. 620 a bank, not a party to the action was ordered to produce on subpœna their account books which contained entries necessary for the trial of the action. *Hay v. Patterson*, 21.

Bare Licensee—See Negligence. *Slade v. Victorian Railways Commissioners*, 5.

Barrister—Application for admission as a barrister—General rules of the Supreme Court, 1887, rule 8 subsection 1—Meaning of the words "University recognised by the University of Melbourne—the fact that a holder of the degree of B.A. of the University of Adelaide has been admitted with due form by the University of Melbourne *ad eundem gradum* is sufficient proof that the University of Adelaide has been recognised by the University of Melbourne. *In re Jones*, 85.

Building Societies' Act 1874 (No. 493) sec. 33 (4)—Companies Statute 1864 (No. 190) sec. 74 (1), (2) (3)—Judicature Act 1883 (No. 761) sec. 9 (6)—Petition to wind up a Building Society by assignee of judgment debt—Form of petition—Inability to pay debts—Costs. *Re the Premier Permanent Building Association*, 139.

Calls, Notice of—See Companies Statute, 1864, *re Melbourne Stock Exchange Agency, &c. Coy.*, 153.

Certificate, Cancellation & Suspension of — See Marine Board Act 1887 *re Taylor*, 23.

Champerty — Champerty implies a bargain of some sort between the plaintiff or the defendant in a cause and another person who has no interest in the subject in dispute to divide the property sued for between them if they prevail in consideration of that other person carrying on the suit at his own expense; It is essential, however, to make such a transaction champerty that the person carrying on the suit at his own expense should have no interest in the thing at variance. *Hayes v. Levinson*, 180.

Charter Party—Breach of charter-party — "representation" or "condition precedent." The words in a charter-party describing a vessel as "now lying at the port of Cape Town" may be either a representation or a condition precedent and it is permissible to look at the surrounding circumstances to construe their real meaning—The party intending to rely upon such words in a charter-party as constituting a condition precedent must plead and prove that such words constitute a material part of the contract or must plead and prove facts from which it results that such words are a material part of the contract. *Breckwoldt v. Colonial Guano Coy.*, 192.

Child, injury to. See Negligence. *Slade v. Victorian Railways Commissioners*, 5.

Common Law Procedure Statute 1865 (No. 274) sec. 180—Sec. 180 ought to be brought into operation only when it appears that there is no dispute about the tenancy *Hopkins v. Kelly*, 147.

———Sec. 332—Ca Re—The mere fact of a defendant who is domiciled here being about to depart from the colony upon a voyage in the usual course of his business will not justify his arrest under a Ca Re, but where a defendant is not domiciled in the colony he does not bring himself within this rule. *Price v. Santley*, 146.

——— s. s. 332, 333—Applications under sec. 333 of Act No. 247 should not be made ex parte, and shouldbe made to the court and not to a Judge in Chambers. *Row v. Smith*, 158.

———Sec. 335—Rules of Supreme Court 1884 Order LII r. 2. Application to discharge a defendant from custody who has been arrested on a writ of capias should be by rule or order *nisi* and not by summons, *Wills v. Castellano* 117.

Companies' Statute, 1864 (No. 190)--Notice of calls--Where an article of association stated "that all moneys payable to the Company shall be payable at the registered office of the Company or at such other place or places and to such person or persons as the directors may appoint," and a subsequent article stated that "the directors may from time to time make such calls on the members as they shall think fit. . . . . And each member shall be liable to pay the amount of the calls so made to the persons and at the times and places appointed by the directors which said persons times and places shall be specified in the notices of such calls respectively. Held—that where the call was made payable at the registered office of the Company it was unnecessary to state in the notice the person to whom it was to be paid, *Re Melbourne Stock Exchange Agency &c. Coy.*, 153.

———Sec. 4 — Syndicate — A syndicate formed for the purchase of land is not a Company, partnership, or association within the meaning of Sec. 4, *Ballantyne v. Raphael*, 34.

———Sec. 16—Notice of incorporation in the *Government Gazette*—Judicial notice of Signature of Acting Registrar-General, *Union Finance Guarantee and Investment Coy., v. Woolcott*, 64.

———ss. 21, 68—Table A, Arts 8, 9—Winding-up Company — List of contributories—A contributory is a person who has agreed to become a member of a company without signing his name to a transfer if he has been treated as a shareholder by the company and has acted as a shareholder—A transferree of a share is not entitled to escape liability because he has never signed the transfer—A shareholder who has paid off a debt due by the Company with the acquiescence of the directors is entitled to credit for the amount so paid as against the liability on his shares, *Re Switchback Railway &c. Coy.*, 191.

———ss. 23, 24, 35, 68, 90, 116 (8), 121, 154 — Sch. 7, rr. 26, 27 — The Court has jurisdiction to entertain an application on behalf of a person, whose name has been placed in the list of contributories by the liquidators in a voluntary winding up, that his name may be removed—The rule prescribed for proceedings for settling the list of contributories in a compulsory winding up apply to a voluntary winding up. *Expte Marion Lane*, 101.

——— sec. 33 — Rectification of register — Repudiating Shareholder —A repudiating shareholder must not only repudiate, but also get his name removed from the register, or commence proceedings to have it removed, before the winding up of a Company. *In re The Fire, Marine and Accident Indemnity Coy*; 46.

——— s.s. 83, 124 — Company —Voluntary winding up — Removal of Liquidator—Locus standi—"Due Cause." A company was being wound up voluntarily, one C.P.W. being the liquidator, owing to certain alleged acts of omission and commission on the part of C.P.W. a large majority of the contributories, i.e. of the parties interested in the liquidation, were desirous that C.P.W. should be removed and one T.M. appointed in his place. It was urged that as the applicants were "in default" they could not make the application, it was also urged that T.M. could not be appointed liquidator inasmuch as he was a debtor of the Company. Held, that to read in the words "not in default" after the word "contributory" in sec. 124 would be to supplement and not to interpret the Act. Held, that the mere fact that a person was indebted to a Company was not, per se, an absolute bar to his being appointed liquidator. Held, that the expression "due cause" in sec. 124 is to be measured by the real and substantial interests of the liquidation, i.e. by the real and substantial interests of the parties interested in the liquidation. *Re Standard Investment Coy. Ltd* 112.

———Sch. 7 Rule 2 — Petition — Where the registered office of a company is closed and the company has ceased to carry on its business a petition for winding up may be served by leaving a copy at the registered office. *Re The Co-Operative Cold Storage Coy. Limited*; 13.

Company.—Amount of capital subscribed for — Power to commence business. A company was formed, the capital being £100,000 in 100,000 shares of L1 each; 65,000 shares were offered to the public; it was provided (inter alia) by the prospectus that £45,000 was to be appropriated out of this issue for working capital; it was also provided that 10,000 fully paid up shares and a bill at four months for £20,000 should be given by the company for the purchase of certain patent rights; the directors subsequently arranged, in lieu of this arrangement, to give 30,000 fully paid up shares for these rights; previous to issue of the writ in the action, 17,131 shares were allotted, in addition to the aforesaid 30,000. An action was instituted by the plaintiff to restrain the defendants from commencing business on the ground of insufficient working capital. Held, that there was not such a disparity between the number of shares actually allotted and the proposed working capital as to induce the court to grant the injunction. *Langier v. Vict. Schanschieff Exctric &c. Coy.*; 126

———Balance Sheet — Dividend - Paying a dividend out of capital—A shareholder can maintain an action in his own name, without having first endeavoured to obtain the assistance of the company by means of a majority

of shareholders, where the act complained of is illegal or fraudulent, or one that the majority of the shareholders could not confirm or ratify—So long as a company pays its creditors there is no reason why, in an apparently flourishing concern, it should not go on and divide profits though every shilling of the capital may be lost—Meaning of "capital." *Phillips v. Melbourne and Castlemaine Soap &c. Coy.*; 148.

————Promoters—Partners.

Promoters of a company intended to be formed are not partners.—*Wilkins v. Davies* 141.

————Rectification of Register — Issues—Motion—Action. The Court will not, on motion, decide issues which are properly the subject of an action.—*Re the Percy Land Co.* 65.

Concealed Vendor—See sale of Land.

Condition precedent — See Landlord and Tenant.—*Wilson v. Stewart* 30.

Contract—See Principal and Agent. —*Clifford v. Moore* 146.

Contributories, list of—See Companies Statute 1864—*Re Switchback Railway etc. Co.*, 191.

County Court Statute 1869 (No. 345) ss. 5, 39, 41—Jurisdiction of County Court—Bill of lading —Construction—To give the County Court jurisdiction the whole cause of action must arise in the colony.—*Brooks Robinson and Co. v. Howard Smith and Sons* 168.

Covenants, performance of —See Landlord and Tenant.—*Wilson v. Stewart* 30.

Criminal Law — Admissions —Admissions in criminal proceedings —Prosecution under the Licensing Act 1885 (No. 857) section 134—Order to review—On the hearing before the Justices defendant by his counsel admitted all the Acts complained of in the information but contended he was protected by a brewer's license. On these admissions and by consent, without taking any evidence, the Justices decided the case and dismissed the summons. Held, that in criminal proceedings the party charged can consent to nothing, and therefore his admissions could not be evidence. The Attorney-General v. Bertrand, L.R. 1 P.C. 520 followed. —*Rattray v. Roach* 188.

————Money found on prisoner at the time of his arrest—Application to hand over same to prisoner for the purposes of his defence—Where, in an application to hand over money found on a prisoner at the time of his arrest for the purposes of his defence, the Court has reasonable grounds for supposing that the money is the proceeds of the property stolen it will not make the order.—*Reg. v. Lawrence*, 147.

————Money found on prisoners at the time of their arrest—Applications to hand over money found on prisoners at the time of their arrest for the purposes of their defence should be made to the Judge at the trial and not to a Judge in Chambers.—*Reg. v. Cane* 179.

Criminal Law and Practice Statute 1864, (No. 233) sec 11—Attempt to commit murder—Grogan on the approach of a constable drew out of his pocket a loaded revolver but before he could do anything further he was arrested—Held, no evidence of an attempt to commit murder.—*Reg. v. Grogan* 59.

————Section 64 — Larceny as a bailee—A person who received a specific sum of money for a specified purpose and who did not apply it to that purpose but converted it to his own use, was held properly convicted of larceny as a bailee.—*Reg. v. Mason* 199.

————sec. 149—Charge of obtaining money under false pretences —Admissibility of evidence to prove Criminal intent. *Reg v. Moore*; 151.

———— sec. 178 — Complaint for injuries to a fence. Question of title—Jurisdiction of Justices ousted. *Avery v. Byrne*; 77.

Damages, excessive—See new trial. *Grosvenor Hotel Coy. v. Castellano*, 106.

Dangerous Machine — See negligence. *Slade v. Vict. Railways Commissioners*, 5.

Debentures — Negotiable instrument—Transfer of debentures—Bona-fide holder for value—To avoid the title of a transferee for valuable consideration it is not sufficient to prove that he took the debentures under circumstances which would have put an ordinarily prudent man of business on enquiry, as to the transferror's title; it must be proved that the transferee wilfully shut his eyes to the facts and matters of what he had notice, and purposely abstained from enquiry for the purpose in his own secret mind of avoiding knowledge. *Sheffield v. The London Joint Stock Bank*, 13 *App. Cas.* 333 commented on. *Goodall v. Australian Freehold Banking Corporation*, 183.

Dividend, paying out of capital—See Company. *Phillips v. Melbourne and Castlemaine &c Coy.* 148.

Duties on Estates of Deceased Persons Act 1870—(No. 388) Sec. 23—13 Eliz. C. 5—Intent to evade payment of duty. The words in S. 23 "with intent to evade" etc., should receive, so far as regards the proof necessary to establish intent a similar interpretation to the words "to the end purpose and intent" etc., in the Statute 13 Eliz. C. 5. Where therefore a man does an act which taken in connection with the other facts of the case must necessarily operate as an evasion of payment of duty under the Act, he must be taken to have intended to evade payment, and it is not essential that there should be any direct and positive proof of an actual or express intent.

Kerferd, J., dissented from the majority of the Court on the facts. *Finlay v. The Queen*, 14.

Easement, abandonment of —See Transfer of Land Statute 1866. *Stevenson v. James.* 107.

Ejectment—See Transfer of Land Statute 1866. *Lake v. Jones*, 72.

Equitable Mortgage—Absence of stipulation as to interest—Right of Mortgagee to interest—A policy of insurance was deposited by way of equitable mortgage in anticipation of a debt to be incurred by the mortgagor to the Mortgagee. Held, that when the debt arose the deposit operated and interest became payable although there was no express stipulation as to interest. *Meadway v. Rhodes*, 164.

Estoppel, definition of—See Landlord and Tenant. *Wilson v. Stewart* 30,

Habeas Corpus—Custody of child. Where a child had been left by its mother in the care of another for a month and the mother afterwards disappeared without claiming it, the custodian (who meantime supported the child) having some years after placed it at school and paid for its maintenance was held entitled to have the child restored to her custody by the school authorities—Semble in such a case the wishes of a child of 16 will not be consulted—The ages of 12 for girls and 14 for boys in criminal proceedings is a fair test of the age when a child can form ideas on such matters. In *re Wigmore* 158.

————Where an unmarried woman of the age of 19 years is living in adultery with a man, the Court will not grant a fiat for a writ of Habeas Corpus unless it be shown that she is deprived of her liberty and detained in custody by some person. In *re Isabella Smith* 40.

————Habeas Corpus by testamentary guardian for the custody of infants—The Court will not interfere with the rights of a testamentary guardian or supersede him in the exercise of his functions, unless it be satisfied that he acted in so improper a manner or placed himself in such a position as to imperatively require in the interests of the children in some essential particular that he should be superseded in the exercise of his office. In *re Robertson* 81.

Husband and Wife—See Settlement. *Glass v. Trustees Executors and Agency Coy.* 118.

Imprisonment for Debt Act 1865 (No 284) s.s. 2, 3—Where a judgment debtor is brought up on a summons upon which no order is made, the jurisdiction to make an order against him is exhausted. —Variation of judgment. *Chamberlain v. McWhinnie* 118., 125.

Infant—maintenance—breaking in on corpus—Form of order. Where two infants were entitled to £75 each, the Court ordered that so much of the Corpus of the share of each infant should be broken into as together with the income of his share, would make a sum of £9 a year in the one case and £7 a year in the other. *Re Rollason* 197.

Insolvency Statute, 1871, (No. 379) s.s. 6—35—Dissolved firm—Power of greater number of members of firm to petition for sequestration—Jurisdiction of Court to amend proceedings. *Re Hoelter* 120.

————sec. 14 — The Court of Insolvency has no jurisdiction to order a witness to pay costs.—*In re Sinclair; exparte Watson* 95.

————ss. 14, 40—Order nisi—Voluntary sequestration—Application to discharge order — Costs. An application to discharge an order nisi obtained for the sequestration of the estate of a debtor was made by the petitioning creditor; it appeared that, on the same day as that on which the order nisi had been made at M; the debtor had voluntarily sequestered his estate at B. without being aware of the making of the order nisi; the court discharged the order with costs to the petitioning creditor to be paid out of the insolvent estate.—*Re Looby* 197.

———— ss. 37 (V) 45 — Technical objection—Consumption of time. A "seizure" took place on the 1st August, and a petition was presented on the 13th August. "No act of Insolvency" under subsection V of section 37 was committed inasmuch as the petition had not been presented "within 12 days" from the "seizure." Such an objection is not a technical one.—*Re Walker* 68.

————s. 37 subsec. IX., s 42—Promissory Note—Security—Act of Insolvency. A promissory note made by the debtor in favor of the creditor is not a security for the debt within the meaning of the Insolvency Statute 1871 The words "whereby the creditors of such estate may be defeated or delayed" in payment of the debts due by such estate" occurring in section 42 are an adjectival sentence qualifying the preceding term "act of insolveney, and the act of insolvency to render an estate liable to sequestration under the section must be of such a character that its natural effect would be to defeat or delay creditors.—*In re Cohen* 42,

———— sec. 49—Discharge of order nisi — Appearance. A respondent is entitled to have his costs of applying to discharge an order nisi although notice of intention to abandon the proceeding may have been served by the petitioner on the respondent.—*Re Blume* 76.

Instruments and Securities Statute 1864 (No. 204) Sec. 21—Setting aside judgment—Affidavit of merits—Under section 21 Act No. 204 a judge has power to set aside a judgment obtained under that Act without any affidavit of merits being filed.—*Greig and Murray v. Hutchinson* 96.

————sec. 22 — Application for a order for deposit of the document proceeded upon should not be made exparte. *Richards v. Cadman*, 121.

————sec. 57 — A bill of sale with a condition for payment a certain time after demand is not rendered void under this section by its being proved that no definite time was fixed for payment. *Semble* per Hood, J. to have a bill of sale declared void under this section it must be proved that it was given subject to some condition for payment not contained in the conditions appearing in the body of the Bill. *Centennial Land Bank v. Exley*, 171.

Instruments and Securities (Bills of Sale) Act 1876 (No. 557,) s.s. 6, 7, 8, 9. Caveat against filing a bill of sale. Creditor of one of several Grantors. Interpretation of Statutes Act. *Leyel v. Lefebvre*, 41.

Intercolonial Debts Act 1887, (No. 959) s.s. 1, 3, 7, 9—"County Court Statute 1869" (No 345) s. 93. A party is only bound to follow a remedy provided by statute when his right also is created by statute; where he has a common law right, any further remedy provided by statute is cumulative. *Primâ facie*, an action lies on the judgment of every court of competent jurisdiction. *Jones v. Reed*, 172.

Interest—See Equitable Mortgage. *Meadway v. Rhodes*, 164.

Intestates Act 1864 (No. 230) sec. 12—If the person entitled to a grant of administration within the meaning of sec. 12 is unfit, the Court may exercise its discretion and refuse the application. *In re Madden*, 181.

Judicature Act 1883 (No. 761) sec. 25—The extended power given by this section to a Judge to reserve any case, or any point in a case for the consideration of the Full Court does not include a power to the Full Court upon the consideration of the points reserved to disregard or overrule the findings of the jury which can only be dealt with upon a motion for new trial or an appeal. *Slade v. Victorian Railways Commissioners*, 5.

————sec. 56 — Injunction — Counterclaim — Where a County Court has jurisdiction to deal with all the matters in dispute between the parties the Supreme Court has no power to make an order restraining further proceeding of an action brought in the County Court until after the determination of an action brought in the Supreme Court. *Steel v. East Mitcham Brick Company*, 38.

————Sec. 59—Administration Suit —Sec. 59 of Act No. 761 applies to Administration Suits so long as there is property within the jurisdiction. *Bell v. Kemp*, 59.

Justices of the Peace Statute 1887 (No. 953)—Complaint for injuries to a fence under the Criminal Law and Practice Statute 1864 sec. 178 —Question of title—Jurisdiction of justices ousted. *Avery v. Byrne*, 77.

————Conviction when punishment is by imprisonment—Warrant of commitment—Admissibility of affidavits to contradict recitals in the warrant on a habeas corpus. *In re Keogh*, 47.

————Prisoner charged before the bench with an offence different from that for which he had been arrested—Refusal of Justices to grant an adjournment on the application of the prisoner's solicitor on the grounds of surprise — Conviction quashed. *M'Manamy v. Fleming*, 43.

————s.s. 82, 91—When a Court of Petty Sessions has no jurisdiction to hear a case, they have no power to dismiss it but should decline to hear it and strike it out. Semble that in such a case, the justices cannot award costs. *Ferron v. Wilkinson* 18.

————sec. 148 — Special Case — When to be stated—On an appeal from Petty Sessions the Court of General Sessions has no jurisdiction to state a case for the Full Court under section 148 before such appeal has been heard and determined. *Fort v. Lane*, 11.

————sec. 150—Order nisi to review—Where an order sought to be reviewed is bad on its face it is not necessary to have an affidavit that no depositions were taken at the hearing. *Muir v. Muir*, 104.

————ss. 153, 157—Review of taxation—Appeal — Costs of appeal of the Court below—Sec. 157 applies to costs of the Court below as well as to the costs of the order nisi. *Strong v. Taylor*, 189.

Land Act 1884 (No. 812)—s. 15—Effect of this section to cure the illegality of any previous Crown grant—Where a Crown grant of land has been issued subject to a condition that the Crown may resume possession at any time on a refund of the purchase money together with interest and compensation, the Governor in Council has no power, without receiving any valuable

consideration, and in a manner not provided in the Land Acts, to extinguish the power of resumption and issue a fresh grant free from this condition. Such a grant is illegal but if issued before the coming into operation of the Land Act, 1884, the illegality is cured by sec. 15 of that Act. *Attorney General v. Goldsbrough* 149.

Landlord and tenant—A party contracting with himself—Where a defendant has an interest with the plaintiffs in the subject matter of the contract if their interests can be distinguished the contract will be enforced and the general rule does not apply that a party cannot contract with himself—Covenant to keep and maintain in a fair and reasonable condition. *Parker v. Sell*, 202.

———Lease — Option of renewal, "provided that A.S. conducts his business in a respectable and business-like manner, and that I am satisfied with him as a tenant..' Meaning of the words "in a respectable and business-like manner." Intention of the parties.—*Weir v. Shepherd* 161.

———Lessor and Lessee—Option to Purchase—Performance of Covenants—Condition Precedent—Definition of Estoppel. A leased to B and C for the term of seven years commencing 12th April, 1882, certain land and premises. The lease contained (in addition to covenants by the lessees not to assign or sub-let without the consent in writing of the lessor, to keep in repair and to pay the rent in advance) the following covenant :—"And it is hereby further covenanted "and agreed by and between the "said parties hereto that if the said "lessees their executors administra-"tors or assigns (having duly paid "the said rent and performed the "said covenants in all respects) shall "at the end of the said term of seven "years hereby granted be desirous to "purchase the fee simple and inheri-"tance of the said premises shall "during the said term of seven years "give to the said lessor his executors "administrators or assigns or leave "for him or them, etc., three calendar "months notice in writing expiring "at or before the end of the said term "then the said lessees their executors "administrators or assigns shall be-"come the purchasers thereof upon "payment of £1400, etc." On the 4th November 1882, the lessees sub-let portion of the premises to a tenant; and on the 5th December 1883, C assigned his interest under the lease to B. A did not give any express consent to the sub-lease or assignment nor was he aware of them at the time they were effected; but he came to knew of them shortly afterwards, and received the rent as usual. On the 13th September 1888 B gave notice of his intention to exercise his option under the covenant. but A refused to perform on the ground that the covenants in the lease had not been duly performed. Held, that a due performance of the covenants in the lease was a condition precedent to the exercise by B of the option of purchase. The mere fact of the receipt of rent subsequent to the breaches of covenant simply amounts to a waiver of the lessor's right to forfeit the lease and not to a waiver of the lessor's right to insist upon the due performance of the covenant as a condition precedent to the exercise by B of the option of purchase. If a man by words or conduct intentionally leads another to believe in the existence of a certain state of things and to act on that belief the former is precluded from averring a different state of things as existing at that time.—*Wilson v Stewart* 30.

Larceny as a Bailee—See Criminal Law and Practice Statute 1864.—*Reg. v. Mason* 199.

Lateral Support—Building—Adjoining land—Grant. A leased land with buildings thereon to B. the lease contained the usual covenant for quiet enjoyment. Subsequently. A leased an adjoining piece of land (for building purposes) to C.; in this last mentioned lease C covenanted to erect certain buildings "at his own costs and expenses." Immediately prior to this action C commenced excavations near a wall of B's building which tended to deprive the said wall of lateral support. B in consequence, instituted this action claiming a declaration that he was entitled to the said lateral support. An interim injunction was obtained; this was afterwards, by consent of all parties, discontinued, C undertaking to shore up the plaintiff's wall and underpin the foundations, the question as to who should pay the cost being left for the trial of the action. Held, on the principle that a man cannot derogate from his own grant, that both the defendants were liable to the plaintiff; but that C was primarily liable by reason of the covenant entered into by him with A and mentioned above.—*Tangye v. Murphy* 142.

Lessor and Lessee—See Landlord and Tenant.—*Wilson v. Stewart* 30.

Licensing Act 1885 (No. 857) s.s. 18, 41, 66, 70—Where the Licensing Court grants a license for a house that is intended shall be built in accordance with certain plans and specifications and shall be completed by a certain date the Court has no power to extend the time for completion—Under such circumstances the Court should direct a rehearing.—*Reg v. Licensing Court of Yarrawonga* 52.

——— Sec. 29 — Application for grocer's licence in a district where there never was a grocer's licence—Meaning of word "increase" in Sec. 29.—*In re Willis* 44.

——— Sec. 70) — Application for renewal of victualler's license—the Licensing Bench is justified in refusing the renewal of a victualler's licence on its being proved to their satisfaction that the applicant is a habitual Sunday trader, whether he has been prosecuted for that offence or not.—*In re Nolan* 156.

——— sec. 86 — Suffering an unlawful game to be played in licensed premises after the premises are closed — Meaning of words—"Suffers or permits any person to play any unlawful game or sport in or upon his licensed premises"—Effect of No. 1008 sec. 2. as regards offences committed under No. 857 sec. 86—Justices of the Peace Act 1887 s. 7—No Stamp on Summons. *Lester v. Torrens* 2 Q.B.D. 403 distinguished.—*Brown v. Treynor* 26.

——— s.s. 98 and 99—Competence of the defendant and his wife to give evidence. The words in Section 99 "in all cases under this Act the defendant and his wife shall be competent to give evidence" are confined to offences under section 99 and the preceding section 98.—*Reg. v. Kilkenny* 160.

Liquidator, removal of. See Companies' Statute 1864. *Re Standard Investment Coy. Ltd.*, 112.

Local Government Act 1874 (No. 506) ss. 54 71—Ouster from office of a councillor concerned or participating in the profit in or of a contract with the municipality. *Re Heather*, 138.

——— ss. 380 399 — Liability of Council for the dangerous condition of a road placed under its care and management—A municipal corporation having knowledge of the unauthorised act of a stranger which does damage to the natural surface of a highway within its jurisdiction which has not been formed or made is not liable in damages to a person injured through the act of the stranger. *Hitchins v. Mayor of Port Melbourne*, 131.

——— ss. 399, 512, and 516—Encroachment on road—Prosecution for penalties under s. 399—The Municipal Council of the district or some person duly authorised by them are the only persons who can institute proceedings to recover penalties under this section, *Pinkerton v. Heaney*, 61.

Maintenance.—See Infant. *Re Rollason*, 197.

Marine Board Act 1887 (No. 965) Sec. 136 (2).—Cancellation and Suspension of Certificates—Act No. 965 creates a Marine Board which puts the Court of Marine Inquiry into motion—The Court and not the Board has power to cancel or suspend

certificates, but the Court cannot act unless directed by the Board. *Re Taylor*, 23.

Marriage and Matrimonial Causes Statute 1864 (No. 268) ss. 31 & 32—Order for maintenance—A debt due to the husband is not goods or chattels within the meaning of section 32 and if the justices on making an order of maintenance, direct the seizure or appropriation of such debt in payment of the allowance, such portion of their order will be set aside—When an order sought to be reviewed is bad on its face it is not necessary to have an affidavit that no depositions were taken at the hearing. *Muir v. Muir*, 104.

———— s.s. 35 and 36 — Proceedings before Justices against putative father for support of illegitimate child—Although the uncorroborated oath of the mother is insufficient in bastardy cases the paternity of the child may be proved without the mother's evidence. *Hanley v. McMasters*, 79.

———— sec. 70 — A prior decree against the petitioner in a suit between the same parties dismissing his petition for divorce on the grounds that the petitioner had been guilty of adultery and cruelty cannot be pleaded as an absolute bar to a fresh petition for divorce for subsequent alleged acts of adultery between the respondent and co-respondent. *Weeding v. Weeding and Rose*, 153.

Married Women's Property Act 1884 (No. 828) section 4—A married woman is capable of suing in contract without joining her husband and without proof of separate estate. *Cotterill v Curran*, 97.

Mining Statute. 1865. (No. 291) sec. 212—Sch. 29—Notice of Appeal from Warden to Court of Mines—Form of notice—Literal compliance with the form given in Sch. 29 is not requisite—Failure to fill up the blank left in the form for the insertion of the name of the place at which the proceedings had been heard by the warden does not make the notice of appeal bad. *Rees v. Carroll*, 195.

Misrepresentation—See Sale of Land.

Money paid—Action for the recovery of money paid under a mistake of fact—in such an action if the position of the defendant has been altered by the plaintiff's mistake he must be placed in statu quo ante before the plaintiff can recover—Admissibility of oral evidence to control a written agreement. *Chirnside v. Keating* 135.

Mortgage, registration of—See Transfer of Land Statute 1866. *Mathieson v. Mercantile Finance &c. Coy.* 154.

Negligence—Dangerous Machine Injury to child—Bare licensee—Trespasser—Points reserved—Finding of jury—Judicature Act 1883 (No 761) Sec. 25. Per Williams and Holroyd, J.J.—Persons in whom property is vested are not liable for an injury caused to a trespasser or a bare licensee even though he is a child of tender years by a machine used by them on their premises (which is not dangerous in itself and which cannot become dangerous accidentally) being meddled with by mischievous persons unauthorised by them but they would be liable for an injury to a bare licensee caused by a trap or hidden danger of the existence of which they knew or ought to be presumed to know. Per Higinbotham, C.J.—The extended power given by the Judicature Act Sec. 25 to a judge to reserve any case or any point in a case for the consideration of the Full Court does not include a power to the Full Court upon the consideration of the points reserved to disregard or overrule the findings of the jury which can only be dealt with upon a motion for new trial or an appeal. *Slade v. Victorian Railways Commissioners* 5.

New Trial—Motion for new trial—Excessive damages—Principle on which new trial will be granted—Power of jury to give excessive damages—*Bailey v. Hart* 9 V.L.R. (L) 66 commented on. *Grosvenor Hotel Coy. v. Castellano* 106.

Partners—Joint and several liability on one contract—Separate action brought against both co-contractors—Judgment signed in both actions—Res judicata—On a joint contract there is only one cause of action and there cannot be two judgments in one cause of action—Where a person, who is in the position of a joint contractor is sued without his co-contractor being joined, he has a right under Order XVI r. 11 to have his co-contractor made a co-defendant with him in the action. *Grey & Murray v. Hutchinson* 53.

Police Offences Statute 1865 (No. 265) s. 7. Breach of condition of license—Order to review—Evidence too uncertain to warrant conviction. Semble, whether the cementing of a building already erected comes within the meaning of the words "when a building is being erected" or not depends on whether the cementing was contained in the original design. *Foulds v. Beavis* 187.

Practice—Appeal from trial before a judge without a jury—Verdict against evidence—Question of fact—Where there are conflicting probabilities which render it a question whether the judge might not have unreasonably come to the conclusion at which he arrived his verdict will not be disturbed. *Warburton v Altson* 170.

————Rules of Supreme Court 1884 Order III r. 6—Instruments and Securities Statute 1864 (No. 204) Sch. 2—Writ of Summons—Special indorsement—Appearance without leave—A writ of summons indorsed in the form provided by Schedule I of The Instruments and Securities Statute 1864 and in addition headed "Statement of Claim" and "Signed" does not lose its character as a writ under the Statute by reason of this additional indorsement, and therefore a defendant, before he can enter an appearance, must obtain leave to appear and defend. *Gerty v. Morrah* 54.

————Order III. r. 6—Order XIV r. 1—Special indorsement—Where a writ was indorsed with a claim against the defendant in her personal capacity and also against her in her representative capacity final judgment was ordered under Order XIV r. 1—The character in which the defendant is sued need not be stated in the title of the writ, it is sufficient if stated in the endorsement. *M'Gee v. Beattie*, 123.

————Order IX r. 2. Judicature Act, 1883, (No. 761) Section 59—Substituted Service—Defendant resident out of the Jurisdiction—Order IX r. 2 does not apply to an action commenced against a person resident out of the jurisdiction. *Moubray v. Riordan*, 19.

————Order IX r. 2—Substituted service—Affidavit—The affidavit in support of an application for substituted service should state how the service is proposed to be effected. *London Discount and Mortgage Bank v. Daish*, 180.

————Order IX r. 2—Substituted service—Application for leave to substitute service of the writ refused where it was not shown that there would be some reasonable probability of the method proposed to be adopted bringing knowledge of the writ to the defendant—Where defendant is absent from the colony and is expected to return within two months, there being no pretence that he is seeking to evade service, an order for substituted service will not be granted—Quœre, whether Order IX r. 2 would extend to allowing substituted service of an ordinary writ against a defendant then out of the jurisdiction. *London Discount and Mortgage Bank v. Daish*, 189.

————Order IX, r. 2—Substituted service—Where it appears that a defendant is resident out of the jurisdiction and that the contract sued on was neither made nor broken within the jurisdiction, an order for substituted service of a writ for service within the jurisdiction will not be granted. *Stephen v. Pain*, 94.

————Order XIII, r. 2—Where a plaintiff desires to proceed under Order XIII r. 2, he must serve the writ of summons and file an affidavit of the service before signing judgment even though the defendants solicitor has undertaken to accept service. *Coburn v. Brotchie*, 123.

———Order XIV r. 1. **Affidavit.** The affidavit required by rule 1 of Order XIV may be made by anyone who can swear positively to the facts verifying the cause of action and the Rule is sufficiently complied with by the deponent stating that in his belief there is no defence. *Elliot v. Pounds*, 13.

———Order XVI, r.r. 4 and 11—Application by plaintiff to add defendants—Meaning of words "questions involved in the cause or matter." *Munro v. O'Hanlon*, 50.

———Order XVI r. 11—Joint and several liability on one contract—Separate action brought against both co-contractors—Judgment signed in both actions—*Res judicata*—On a joint contract there is only one cause of action and there cannot be two judgments in one cause of action—Where a person, who is in the position of a joint contractor, is sued without his co-contractor being joined, he has a right under Order XVI r. 11 to have his co-contractor made a co-defendant with him in the action. *Greig and Murray v. Hutchison*, 53.

———Order XVI r. 11—Adding defendants—Order XVI r. 11 applies to cases where a defendant under the old system of pleading, could have pleaded in abatement the non-joinder of those persons whom the plaintiff seeks to add as defendants. *Munro v. O'Hanlon*, 3.

———Order XVI. r. 12—Writ of Summons—Amendment—A plaintiff cannot strike out the name of another plaintiff and make him a defendant without his consent. *Judd v. Abbott*. 45.

———Order XVI. r. 46—This rule is not applicable to actions brought to recover damages for breach of covenants for title in conveyances of land. *Dowdy v. Benjamin*. 70.

———Order XVII r.r. 1, 2—Order XLV. r. 1—Garnishee proceedings—Death of judgment debtor before order nisi for a Garnishee Order obtained—No personal representative of the judgment debtor appointed—Where a judgment debtor has died, garnishee proceedings should not be instituted until a personal representative of the judgment debtor has been appointed. *Peters v. Ross*. 39.

———Order XIX r.r., 4, 16, 27. Inconsistent defences may be pleaded together—The question of whether an agreement is in writing or not, is a material fact and as such ought to be set out. *Coldwell v. Hehir*. 57.

——— Order XIX r.r. 4, 27—Embarrassing pleading—Pleading matter going only to the question of costs—Matters which merely affect the question of costs ought not to be set up in the pleadings. Ricketts v. Fraser, 8 A.L.T. 21 followed. *Sundercombe v. Stubb*. 55.

———Order XIX r.r. 6, 7—Malicious prosecution—Denial of each and every allegation in the Statement of Claim—Particulars—Where, to an action for malicious prosecution, the defendant denied each and every allegation in the statement of claim, he was ordered to give particulars of his reasonable and probable cause for instituting the proceedings. *Price v. Santley*. 190.

———Order XIX. r. 7.—Libel—Further particulars—Order. *McCarron v. Syme*. 3.

———Order XIX r.r. 13, 17, 19—Defence—Embarrassment—A denial of the whole of "the allegations in the Statement of Claim" is a good defence. *Mackinnon v. Jenkins*. 13,

———Order XIX r.r. 15, 27, Order XXV. r. 4—Points of Law raised in the pleadings—General demurrer is not a good pleading under the present rules of procedure—The point of law relied upon must be specifically stated. *Gibbs v. Howden*, 178.

———Order XIX r. 16—Departure—Pleading—Action for specific performance—Defence raising Statute of Frauds—Reply of part performance. *South Suburban Land &c Coy v. Hughes*, 49.

———Order XIX r. 27—Order XXV r. 4—Cases in which the power vested in the Judge under Order XXV r. 4 will be exercised—Pleading evidence. *Wall v. Bank of Victoria*, 121.

———Order XX r. 1 (*a*)—Specially indorsed writ—Delivery of Statement of Claim—Where the plaintiff commenced an action as executrix on a specially indorsed writ, and after the commencement thereof she discovered other causes of action against the defendant which were not the subject of special indorsment, she was allowed to deliver a statement of claim incorporating all the causes of action against the defendant. *Franklin v. Franklin*, 145.

———Order XXII. r. 6 (*a.*), Order XXIII r.r. 5, 5*—Payment into Court without admitting liability coupled with a denial of the facts alleged in the Statement of Claim—Reply joining issue on the denial of facts and specifically alleging that the sum brought into Court is not sufficient to satisfy the claim—Time for filing memorandum of close of the pleadings. *Stahl v. Bank of Australasia*, 58.

———Order XXIV r. 2—Application for leave to deliver a further defence after reply delivered should be made on summons supported by affidavit as to the truth of the matter sought to be pleaded and also as to when it arose. *Sander v. Sundercombe*, 70.

———Order XXV r. 4—The object of rule 4 of Order XXV was to get rid of frivolous actions, and therefore where a statement of claim discloses no reasonable cause of action, the proper course is to apply under this rule to have it struck out. *Weedon v. Peck*, 94.

———Order XXV r. 4—Where the defence to a contract is that the defendant acted as agent only, the defence should show not only that the plaintiff knew that the defendant was acting merely as agent but also that the plaintiff never intended to contract with the defendant as principal. *Clifford v. Moore*, 146.

———Order XXVII rr. 4, 11—In an action for specific performance of a contract or in the alternative damages, the plaintiff cannot, in the absence of a defence, abandon his claim for specific performance and enter judgment for damages only under Order XXVII r. 4, he should place the action in the list as provided by r. 11. *Barrett v Haughton*, 194.

———Order XXVII r. 11—Motions for judgment under Order XXVII r. 11 and analogous motions can be listed for hearing on the days set apart for hearing probate applications so long as Mr. Justice Hodges hears such applications. *De Mesquita v. Saunders*, 146.

———Order XXVII r. 11—Motions for judgment under Order XXVII r. 11 and analogous motions can be listed for hearing on the days set apart for hearing probate applications so long as Mr. Justice Hood hears such applications. *Riddell v. McWhinnie*, 126.

———Order XXVIII r. I Amendment of Statement of Claim—Misrepresentation—Interrogatories—Costs—Where in an action for damages on the ground of misrepresentation, the plaintiff, after the pleadings were closed, discovered by means of interrogatories, another ground of misrepresentation, he was allowed to amend his statement of claim at his own cost by adding such misrepresentation. *Hay v. Paterson*, 20.

——— Order XXVIII r. 11—Order LXV r. 27 (16)—Certificate for Counsel—Order made to amend an order after it had been made by the Judge by adding a certificate for Counsel. *Dougherty v. Dougherty*, 22.

———Order XXXI r.r. 1, 11—Interrogatories — Answers — Where a defendant has given to the plaintiff a written notice of his intention to apply at the trial for leave to amend his defence, the plaintiff before the trial cannot interrogate him with regard to the subject matter of the proposed amendment—a party interrogated must answer as to his "knowledge," "information," and "belief"; an answer as to his "knowledge" is not sufficient. *Grassmere Estate Coy. v. Illingworth*, 45.

———Order XXXI r.r. 6, 11—In-

terrogaties Objections to answering—Tendency of answer to criminate—Bona fides. *Guthrie v. Guthrie*, 89.

——Order XXXI r. 11—Interrogatories—Further and better answers—A plaintiff is not entitled to ask a defendant to admit upon oath the construction sought to be placed on certain documents by the plaintiff—Where a defendant is interrogated as to his depositions in an examination in the Court of Insolvency he is not entitled to refuse to answer the same on the ground that by inspection of the depositions the plaintiff could obtain the information he desires. *Looker v. Murphy*, I.

——Order XXXI r.r. 21, 26—Interrogatories—Heading—Payment into Court—The words constituting the heading to interrogatories are to be taken into account and therefore where the interrogatories together with the heading exceed 5 folios, the party exhibiting the interrogatories should pay into Court such further sum as is required by rule 26 of order XXXI—Until such further sum has been so paid the party interrogated cannot be required to answer. *Gunn v. Pierce*, 40.

——Order XXXII r. 6—Judgment on admissions in the pleadings—This rule was not intended to apply to a case in which the admission is an admission of fact raising a difficult question of law. *Greig v. Hutchinson*, 104.

——Order XXXVI r. 1—Venue—Change of Venue—A change of venue from the country to Melbourne will not be granted on the ground merely that the sending of counsel from Melbourne would cause additional expense. *Leversha v. Wrangham*, 22.

—— Order XXXVI., r. 3—Power of Judge in chambers to vary his own order. *McNamara v. Cameron*, 144.

——Order XXXVI r. 39—Judicature Act 1883 (No. 761) sec. 25—Point of law reserved for Full Court—A judge in chambers has no power to reserve for the Full Court a point of law arising on the hearing of a summons. *Spalding v Bailey*, 154.

——Order XLV. r. 1—Garnishee proceedings—Affidavit—The affidavit filed in support of an application for a garnishee order nisi must be sworn by either the judgment creditor or his solicitor. *Hickling v Kelly*, 158.

——Order XLV r. 1—Insolvency Statute, 1871 (No 379) s. 65 (4) (5)—Garnishee Order nisi—Insolvency of judgment debtor—A judgment creditor who has obtained a garnishee order nisi is entitled to the attached debt as against the trustee in insolvency of the judgment debtor where the insolvency has been subsequent to the garnishee order nisi. *Cairns v. Walsh*, 167.

——Order XLV. r. 2—Garnishee Order—Garnishee Order—Partnership. firm — A Garnishee order cannot be made under order XLV. r. 2—attaching a debt due from a partnership firm described by its partnership name. *Bank of Australasia v. Hamilton*, 179.

——Order XLV r. 9—Garnishee order nisi—Garnishee's Costs—Equitable Assignment—A garnishee is a party to garnishee proceedings and therefore a Judge has power to provide for his costs under order XLV. r. 9—No particular form of words is necessary to constitute an equitable assignment provided that it appears that there is an intention of transferring or appropriating the chose in action to or for the use of the assignee. *Beecham v. Pater*, 124.

——Order LVII. r. 1—Interpleader—Where a sheriff is directed to levy upon a judgment debtor's interest in the property of a partnership, he should seize so much of the partnership effects as may be requisite and sell the undivided share of the debtor partner therein without reference to the state of the accounts between the debtor and his copartners and should assign the debtor's interest therein to the purchaser. *Blackburn v Wagner*, 90.

——Order LVII r. 1—Interpleader—In an interpleader application a judgment debtor cannot set up the right of other persons to the goods seized in execution—Such persons should claim the goods themselves. *Grant v. Munro*, 109.

——Order LVII r. 1—Married Women's Property Act 1884 (No. 828) s.s. 4 (1), 8; 13—Interpleader—Claim by wife of judgment debtor of goods alleged to be purchased by her with money given to her by the judgment debtor—Proof of Claim. *Dulon v. Roberts*, 168.

——Order LVIII r. 15. Application for security for costs of Appeal under special circumstances. Appeal in list for trial—Delay in making application. *Forsyth v Burns*, 19.

——Order LVIII r. 15. Application for Security for costs of Appeal under special circumstances—Poverty of Appellant admitted—Important point of law to be decided—Application refused. *Hitchins v. Mayor of Port Melbourne*, 19.

——Order LVIII, r. 15. Order setting aside irregular judgment and order decreeing restitution of lands taken in execution under that judgment. Final or interlocutory proceedings. *Main v. Haskin*, 18.

——Order LXIV r. 7—Order 39 r. 4—Application for extension of time to serve notice of motion for a new trial after the time had expired—Insufficiency of affidavit. Walker v. McKinley 11 V.L.R. 366 explained. *Picken v. Shire of Mount Alexander*, 200.

——Order LXV. r. 12—Judgment recovered for less than £50—Costs—Where in an action judgment is given for the plaintiff for a sum less than £50 with costs, no mention being made of the scale on which the costs were to be taxed, the presiding Judge intending to allow the costs on the Supreme Court scale—the judgment was subsequently directed to be entered up in favor of the plaintiff with costs on the Supreme Court scale. — *Skinner v. Australian and British Land etc., Coy.* 57.

——(Probate) — Administration — Leave to expend infants capital on their maintenance, etc.—Substantive motion. An application was made for (*inter alia*) a grant of administration and for leave to expend infants' capital on their maintenance, etc. The court entertained the application for leave to expend on the same motion as the application for a grant of administration.—*In re Watson* 131.

——(Probate) — Administration — Persons entitled — Unfitness — Intestates' Act 1864 (No. 230) sec. 12. If the person entitled to a grant of administration within the meaning of the "Intestates' Act 1864" sec. 12 is unfit the Court may exercise its discretion and refuse the application.—*In re Madden* 181.

——(Probate)—Administration Act 1872 (No. 427) Sec. 25—Commission to executors—The Court has no power to allow commission to one of several executors—An executor taking a legacy under the will not necessarily thereby deprived of right to commission.—*In the will of Holmes* 52.

——(Probate)—Administration Action—Wilful default—Reference to Chambers. In an action for administration it is competent for the court to allow a case of wilful default though not stated in the pleadings to be raised at any time during the action; it will not direct an account upon suspicions circumstances however strong but will require distinct evidence.—*Spier v. Thorn* 110.

—— (Probate) — Administration with the will annexed—Eldest son—Majority of interests. A testatrix died having by will given all her property to her mother and appointed her sole executrix. The mother was too enfeebled by age to discharge the duties of administering the estate. An application was made by the eldest son for a grant of administration with the will annexed, which was, however, opposed by the mother. Held that *ceteris paribus*, the eldest son is entitled to the grant; primogeniture, however, gives no right to preference against the wish of the parties interested.—*Re Esther Legh* 99.

——Probate—Executors according to the tenor "trustees" held to mean "executors."—*In will of Beckwith* 174.

———Probate — Interlineation in will—Affidavit that the alteration was made before the execution by the testator dispensed with owing to the special circumstances of the case.—*In will of Bear* 109.

———(Probate)—Old Will not proved No personalty—Probate for purposes of title—Death of testator before "Administration Act 1872" — The Court will not grant probate of a stale Will. merely to give greater facility for making title—especially where there is no personal property left for probate to operate upon.—*In will of Cox* 41.

———Probate Act 1887 (No. 928) ss. 4, 7, — Affidavit of conformity — Executor — Administrator — Master-in-Equity — The Master-in-Equity is not entitled by the terms of the Act to demand from the attorney under power, of an executor residing in England, an affidavit of conformity before the seal is affixed to the exemplification of the probate of a will.—*In will of Walker* 88.

——— Probate Act 1887 sec. 4—Old will—Real property—Application was made to have the seal of the Supreme Court affixed to the exemplification of the probate of a will which had been proved in England in 1855. The only property of the testator in the Colony was real estate.

Held, that Act No. 928 is to be construed as an Act dealing with the granting of probates and letters of administration, and therefore the same objection as would lie to the granting of the latter, would also lie to applications to have the seal affixed under section 4. *In will of Buckley*, 100.

———Probate—Signature of testator in attestation clause—Affidavit of witnesses.

A testator signed his will in the attestation clause; one of the witnesses made an affidavit to the effect that the testator believed, that, in doing so, he was signing in the correct place.

Held that the affidavit should be made, unless there was some special reason, by both the witnesses, and that all the facts connected with the signing of the will by the testator should be stated and not the inference drawn by the witnesses from those facts. *In will of Brown*, 70.

———Probate — Substituted Executorship. A testator appointed his widow executrix during her life, and on her decease appointed his son-in-law executor. Probate granted to widow, reserving the right of the son-in-law to come in and prove after her decease. *In the will of Theiss*, 173.

———Probate —Testamentary instrument in the form of a deed—Testator's intention—Parol evidence. An instrument, in the form of a deed, from which the intention of the maker, that it is to affect the destination of his property after his death, can be gathered will, if properly attested, be held to be testamentary; and the testator's intention that such an instrument should operate as a will may. be proved by parol evidence. *Re Thomas*, 196.

——— Probate—Will—Codicil—Construction—"right heirs" next of kin —"Intestates Act 1864."

By his will dated 2nd April 1860 a testator devised certain real estate in a certain manner with remainder to his "right heirs." By a Codicil dated 17th February 1869, he devised certain other real estate in a similar manner with remainder also to his "right heirs." Held that the words "right heirs" in the codicil pointed to the same person as the same words occurring in the will that is to the "heir at law" and not the "next of kin." *Haslett v Lynch*, 67.

———Probate—Will—Construction.

A testator died having duly executed a will and a codicil; by the codicil it was provided as follows:—"I also "will and decree that the business of "the farm be carried on as usual until "my youngest daughter, Charlotte "Lowry, attains the age of 18 years "and all profits if any, to be paid to "my executors to be deposited in a "bank until my daughter Charlotte "attains the age of 18 years, and then "all my real and personal estate to "be sold and divided as hereinbefore "mentioned; the profits, if any, to "be divided between my aforesaid "daughters Annie, Minnie, Elizabeth, "and Charlotte Lowry. Also "should any of my four daughters "named above marry and die without "issue one-half of hers or their "portion to be divided between the "survivors and the other half between "my grand daughters Annie and "Jane for their sole use and benefit "and in the case of the death of one "the said sum to be paid to the "survivor."

Held, that no one of the testator's daughters was entitled to receive her share in the residue until the day on which the testator's daughter, Charlotte, would if living, attain the age of 18 years. *Robertson v. Fox*, 71.

———(Probate)—Will, construction —Contract for the sale of land—Subsequent devise to vendees. A sold to his two sons certain lands for a certain sum payable by instalments before the time fixed for the payment of any instalment A died having duly made his last will which bore date shortly after the date of the contract of sale; by his will he devised the land in question to his two sons (above mentioned) "for their own use in equal shares." Held that the two sons took the land absolutely. *Scath v. Bogle*, 88.

———Will—Grant of probate of portion of the will. A testator made his will "on two sheets of brief paper fastened at the corner. A third sheet was annexed to them by way of a back sheet At his death it was discovered that the second sheet had been torn out, and had disappeared. Both the first and second sheet had been duly signed and attested; the whole estate was disposed of by the first sheet, the second merely containing the ordinary trusts &c. Probate was granted of the first page only; the probate copy to bear date as of the original execution of the will as shown by the affidavit of one of the attesting witnesses. *In will of McDonald*, 120.

———Wills Statute 1864 (No. 222) sec. 19—Alteration—Due execution—Signature Initials. A testator altered his will after execution. Opposite the alteration the witnesses wrote their names in full but the testator placed his initials merely. Held, on the authority of Re Blewitt (5 P.D. 116), that the alteration was duly executed. *In will of Pugh*, 110.

Principal and Agent—Where the defence to a contract is that the defendant acted as agent only, the defence should show, not only that the plaintiff knew that the defendant was acting merely as agent but also that the plaintiff never intended to contract with the defendant as principal. *Clifford v. Moore*, 146.

Promissory Note—Blank left for payee's name—Cancellation of stamp—"Stamp Duties Act 1879" (No. 645) s.s. 46, 47, subs 11. A promissory note issued in blank *primâ facie* implies an authority in a *bonâ fide* holder to insert the name of the payee. Semble; if the stamp on a joint and several promissory note, made by two makers, is cancelled by the maker signing last, the note, though invalid as against the first maker, may be valid as against the second. *Bagley Bros v. Ellison*, 174.

Promoters. See Company, *Wilkins v. Davies*, 141.

Prospectus. See Sale of Land.

Public Health Amendment Statute, 1883 (No. 782) Section 131—Insufficiency of notice to owners under this section. *Local Board of Health of Hawthorn v. Fisher*, 200.

Real Property Statute 1864 (No. 213) s. 69. Action to recover possession of title deeds. A married woman can extinguish a power of appointment without her husband's concurrence notwithstanding the provisions of section 69 of the Real Property Statute 1864. This section is enabling not restrictive. *Thomas v. Ormond*, 91.

Register, rectification of—See Companies Statute 1864. *In re The Fire, Marine, and Accident Indemnity Coy*, 46.

Rescission—See Sale of Land. *Grassmere Estate Co., v. Illingworth* 55.

Review, order nisi to—See Justices of the Peace Act 1887. *Muir v. Muir*, 104.

Right Heirs, meaning of—See Practice (Probate). *Haslett v. Lynch*, 67.

Sale of Land—Contract for the sale of land—Certificate of Title in vendor's own name. One of the conditions in a contract for the sale of land was to the following effect: "The certificate of title to the property sold shall be produced to and a copy thereof may be made by the purchaser &c." Held, that the expression "certificate of title" meant a certificate in the vendor's own name. *Stoddard v. Wood*. 66.

———Contract for the sale of land—Concealed vendor. Where a vendor admits that he solicited purchasers to buy, and they bought on his advice without making further inquiry, it is necessary for him to satisfy the court that he made the purchasers fully aware of the fact that he was a vendor and brought his double position plainly before them. [Compare Ballantyne v. Raphael (11 A.L.T. 34).]. *MacVean v. Woodcott*, 74.

———Contract for sale of land—Production of Title—Reasonable time. A contract for the sale of land contained amongst other conditions the usual one which provides for the production of the title and statement of requisitions, &c. The following condition also was inserted: "The "vendors are applying to bring the "land under the Transfer of Land "Statute and the time for making "requisitions shall be extended to run "from the date of production of such "title and not from the day of sale." Held that the result of the joint operation of the two clauses was to give the vendor a reasonable time to bring the land under the Act. The purchaser, however, was not bound to wait until a prior vendor, between whom and himself there existed no contract, although acting with reasonable diligence, might bring the land under the Act. *Arvier v. Eastwood*, 11.

———Contract for the sale of land—Prospectus—Misrepresentation—Concealed vendor—"Companies' Statute 1864" Sec. 4. A syndicate was formed for the purpose of taking over certain land at Campbellfield. The members of the syndicate, as was alleged, were induced to become members by misrepresentations contained in a prospectus that was issued by the vendors. In this prospectus the vendors names did not appear, but, as subsequently transpired, two members of the syndicate who ostensibly were co-purchasers with the other members were in reality also the vendors; shortly before the formation of the syndicate they had purchased the land from the previous owners at about half the price at which they were disposing of it to the syndicate. Subsequently a contract was drawn up whereby the vendors sold the property to one member of the syndicate who acted on behalf of the others. It was alleged by the plaintiffs that during the whole proceedings they had been in ignorance of the fact that two of the members of the syndicate were also the vendors. Held, that the prospectus was sufficiently misleading as to form a good ground of action inasmuch as having undertaken to state facts it stated those facts incorrectly. The fact that an ostensible purchaser is in reality a vendor may or may not be material; it would be material if a person who had a knowledge of and belief in another, put his money into the same transaction on the faith of that knowledge and belief. The syndicate formed by the plaintiffs and defendants for the purchase of the land was not a company partnership or association within the meaning of the "Companies Statute 1864, sec. 4." The order made in the case of the several plaintiffs who were successful was; that the vendors should return to them the money they had paid and give them an indemnity for any liabilities in connection with the syndicate and that on their doing so they (the plaintiffs) should assign to them (the vendors) their interests under the contract. *Ballantyne v. Raphael*. 34.

———Contract for Sale of Land—Recission. By a contract dated 1st March 1888 A sold certain lands to B; B subsequently sold to C; C to D and D to E. The contract between A and B contained the following condition:—"If the purchaser shall fail "to comply with the above condi-"tions, or shall not pay the whole of "the deposit as aforesaid or shall not "give the acceptances as aforesaid, "or shall not duly pay the promis-"sory notes or acceptances given in "part payment of the purchase money "or either of them, his deposit "money, or so much thereof as shall "have been paid shall be actually for-"feited to the vendor, who shall be "at liberty without notice to rescind "the contract and resell the property "bought by the purchaser by public "auction or private contract, and the "deficiency (if any) in price . . . ". . . shall be made good by the "purchaser." Subsequently to the sale by D to E, A exercised his power under the condition. Held that the exercise by A of his powers under the condition did not so affect the contractual relation subsisting between A and B as to enable subsequent vendors to put an end to their respective contracts by a notice of recission. *Grassmere Estate Co v. Illingworth* 55.

———Vendor and Purchaser—Conditions of Sale—Compensation clause—Misdescription or defect in title. *Bruce v. Sturt* 25.

Settlement—Power of appointment—Exercisable by deed—By an indenture of marriage settlement a certain sum was transferred to trustees to be (and which subsequently was) invested in the purchase of real estate; the trusts were for wife for life, after her death, in the event of her predeceasing the husband. for the husband for life; "after the decease "of the survivor leaving any child or "children of the said marriage as the "said [wife] may notwithstanding her "coverture appoint." The husband predeceased the wife. Held that the power of appointment was exercisable by will or by deed, and was not limited to the children of the marriage. *Glass v. Trustees Executors & Agency Co. Limited* 118.

Shareholder, repudiating See Companies Statute 1864. In *re The Fire Marine and Accident Indemnity Coy.* 46.

Stamp Duties Act 1879 (No 645) ss. 46, 47 (11) Semble; if the stamp on a joint and several promissory note made by two makers is cancelled by the maker signing last, the note, though invalid as against the first maker, may be valid as against the second. *Bagley Bros. v. Ellison* 174.

Stay of proceedings—See Action—*Cruickshank v. Tasmanian Steam Navigation Coy.* 20.

Survey Boundaries Act 1885 (No. 855) Sections 3. 4, and 6—Difference between "discrepancy" and "patent error or mistake in section 4. *Brown v. Anthoness* 204.

Transfer of Land Statute 1866 (No. 301) ss. 38, 129 sub-sec. 3—Administration Act (1872) ss. 6 and 10. The Commissioner of Titles has no power to refuse to register a transfer from an executor or executrix to a devisee until proof has been given that all the debts owing by the testator's estate have been paid or duly provided for. *Ex parte Wisewould* 182.

———s.s. 42, 84, 85—Mortgage—Registration—Notice—Sale. Land under the operation of the above statute being the subject of a mortgage is not a "security" for the sum advanced while the mortgage remains unregistered; accordingly before the mortgagee can take any step towards selling the land, the mortgage must be registered; e.g., a notice under sec. 84 to be valid must be served after the registration of the mortgage. *Mathieson v. Mercantile Finance &c. Coy.* 154.

———sec. 49. Act No. 872, s.s. 7, 8—Rectification of title—Mutual mistake—Privity. The plaintiffs and defendant were respectively the proprietors of two adjoining pieces of land front-

ing a certain street formerly in the possession of a single proprietor. Two cottages stood upon one of the pieces and an hotel upon the other. The plaintiffs and defendant did not derive direct from the original proprietor but deduced their title through a number of intermediate purchasers. The original proprietor had sold that portion of his land on which the cottages stood before he had sold the other portion. On each step of the title in either case it appeared in evidence that the object of each transaction was not the purchase of a certain number of feet of land but of the buildings respectively. It was subsequently discovered that the frontages occupied by the cottages in the one case and by the hotel in the other did not correspond with the measurements set out in the certificate of title but the frontage set out in the Certificate of Title to the land on which the cottages were built encroached to the extent of 5½ inches upon the boundary wall of the hotel. The plaintiffs claimed to recover possession of the 5½ inches, and the defendants counterclaimed for rectification of the title. Held that the defendant would be entitled to have his certificate rectified by having the 5½ inches included in it so as to make it correspond with the land occupied by the hotel, provided that he could obtain for the plaintiffs a title to a corresponding portion of land at the other extremity of the frontage represented in their certificate of title. On the question of privity, Sutherland v. Peel (1 W W and a' B 18) followed. *Pleasance v. Allen*, 28.

———Section 49—Ejectment by registered proprietor—Adverse possession—The effect of the provision in section 49 as to adverse possession is to give to the person in possession the same rights as he would possess if he were assailed by a person having a good title at common law to the land with reference to which the action is brought.—*Lake v. Jones* 72.

——— Sec. 49——". . . . . Where the possession is not adverse to the interest of any tetant" —Meaning of words "interest of any tenant" — Negligence — Estoppel — *Sandhurst M.P.I. and Building Society v. Gissing* 62.

——— Section 49 and Amending Acts (1878) sec. 2 and (1885) sec. 41— Extinction of easement by abandonment—The omission of the Registrar of Titles to enter an easement as an encumbrance on the certificate of title of the servient tenement does not relieve such tenement of its liability—The question of abandonment of an easement is a question of intention and mere non-user even for over 20 years does not of itself constitute abandonment.—*Stevenson v. James* 107.

——— s.s. 84 and 85 — Action for recovery of money paid by mistake— Mortgage under the Act— Where interest only is in arrear service of notice on the Mortgagor under section 84 to pay the money owing on the Mortgage gives the Mortgagor the option of paying off the interest before time limited so as to prevent the power of sale arising or of paying off both principal and interest at any time before a sale is effected—If the Mortgagor exercises his option by payment of both principal and interest the Mortgagee can only charge interest up to the date at which the principal money comes into his hands and not up to the time fixed for payment of the principal money in the mortgage.—*Ewart v. General Finance and Agency Coy.* 97.

———Sec. 93—Ejectment by mortgagee—Section 93 secures to a mortgagee under the Statute all the remedies he would have been entitled to under the old law in addition to the new remedies provided by the previous sections of the Act—therefore in a mortgage in the statutory form where no time is fixed for payment of the principal sum, the implied covenant for quiet enjoyment does not amount to a redemise, and the mortgagor is a mere tenant at sufferance and may be ejected without demand. Semble, if a time certain is fixed for payment, the covenant would amount to a redemise for that period. *Commercial Bank v. Breen*, 92.

——— s. 111, Transfer of Land (Dower 1866) Statute [No. 353 s. 12, Statute of Trusts 1864, No. 234 s. 19,—Vesting order—Notice. W. B. and H. were co-trustees for a certain religious body and as such were the registered proprietors of certain land. W. was removed from his office of trustee and S. appointed in his place; thereupon W. entered a caveat against dealings with the said land. B. H. and S. subsequently applied to W. to execute a transfer from W. B. and H. to B. H. and S. which W. refused to do. B. and H. then applied to the Commissioner of Titles for an order vesting the land in themselves (with the intention of afterwards transferring to themselves and S.) The order was made, no notice being given to W. The order was forwarded for registration and then W. received notice of the intended dealing by reason of his caveat. He applied to the Court for an injunction. Held, that even assuming that the Commissioner of Titles had jurisdiction to make the order, he should not have done so until notice had been given to the parties interested. *Werner v. Boehm*, 128.

Trespasser—See negligence. *Slade v. Vict. Railways Commissioners*, 5.

Veterinary Surgeons Act 1887 (No. 956) section 23 the word "person" in the first line of that section, includes a corporation. *Christophers v. Mutual Store*, 186.

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Bankrupt—Undischarged bankrupt —Second adjudication of bankruptcy Validity. — *Exparte executors of Lord* 178.

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Vendor and Purchaser Act 1875, (39 Vic. No. 2)—As to payment of interest on purchase money. — *Princess v. Heazlewood* 205.

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